INTRODUCTION TO THE STUDY OF LAW

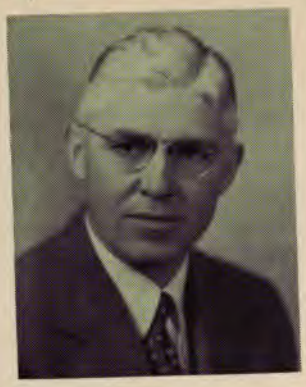
SYLLABUS AND SELECT CASES

BY

MARION RICE KIRKWOOD

ASSOCIATE PROFESSOR OF LAW IN
LELAND STANFORD JUNIOR UNIVERSITY

STANFORD UNIVERSITY, CALIFORNIA
STANFORD UNIVERSITY PRESS
1916



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(Blackstone's Commentaries, III, Appendix, p. xiii.)

George the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. Command Charles Long, late of Burford, gentleman, that justly and without delay he render to William Burton two hundred pounds, which he owes him and unjustly detains, as he saith. And unless he shall do so, and if the said William shall make you secure of prosecuting his claim, then summon by good summoners the aforesaid Charles, that he be before our justices at Westminster, on the octave of Saint Hilary to show wherefore he hath not done it. And have you there then the summoners and this writ. Witness ourself, at Westminster, the twenty-fourth day of December, in the twenty-eighth year of our reign.

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MIDDLESEX, TO WIT } **The sheriff is commanded that he take Charles Long, late of Burford, in the county of Oxford, if he may be found in his bailiwick, and him safely keep, so that he may have his body before the lord and king at Westminster, on Wednesday next after fifteen days of Easter, to answer William Burton, gentleman, of a plea of trespass (AND ALSO to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of the court of the said lord and king, before the king himself to be exhibited); and that he have there then this precept.**

The within named Charles Long is not found in my bailiwick.

George the Second, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. WHEREAS, we lately commanded our sheriff of Middlesex that he should take Charles Long, late of Burford, in the county of Oxford, if he might be found in his bailiwick, and him safely keep, so that he might be before us at Westminster, at a certain day now past, to answer unto William Burton, gentleman, of a plea of trespass (AND ALSO to a bill of the said William

against the aforesaid Charles, for two hundred pounds of debt, according to the custom of our court before us to be exhibited); and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick, whereupon on behalf of the aforesaid William in our court before us it is sufficiently attested that the aforesaid Charles lurks and runs about in your county: THEREFORE we command you, that you take him, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, on Tuesday next after five weeks of Easter, to answer the aforesaid William of the plea (and bill) aforesaid; and have you there then this writ. WITNESS, Sir Dudley Ryder, knight, at Westminster, the eighteenth day of April, in the twenty-eighth year of our reign.

By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

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(Blackstone's Commentaries, III, Appendix, p. xix.)

George the Second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. WE command you that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford, in the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body before the Barons of our Exchequer at Westminster, on the morrow of the Holy Trinity, to answer William Burton, our debtor of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said Exchequer, as he saith he can reasonably show that the same he ought to render; and have you there this writ. WITNESS, Sir Thomas Parker, knight, at Westminster, the sixth day of May, in the twenty-eighth year of our reign.

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> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign states, citizens or subjects.
>
> In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

B. The organization of the federal courts and jurisdiction inter se.*

U. S. Constitution, art. III, § 1:—

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

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a. The districts.

Judicial Code, § 69-115.

b. The circuits.

Judicial Code, § 116:—

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* The "judicial code" to which references are herein made may be found in 36 U. S. Statutes at Large, p. 1087-1169; 1 Federal Statutes Annotated, (Supp. of 1912), p. 131-252, and 1 Compiled Statutes, 1913, p. 398 ff.

There shall be nine judicial circuits of the United States, constituted as follows:

First. The first circuit shall include the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.

Second. The second circuit shall include the districts of Vermont, Connecticut, and New York.

Third. The third circuit shall include the districts of Pennsylvania, New Jersey, and Delaware.

Fourth. The fourth circuit shall include the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Fifth. The fifth circuit shall include the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

Sixth. The sixth circuit shall include the districts of Ohio, Michigan, Kentucky, and Tennessee.

Seventh. The seventh circuit shall include the districts of Indiana, Illinois, and Wisconsin.

Eighth. The eighth circuit shall include the districts of Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, Wyoming, North Dakota, South Dakota, Utah, and Oklahoma. [New Mexico.]

Ninth. The ninth circuit shall include the districts of California, Oregon, Nevada, Washington, Idaho, Montana, and Hawaii. [Arizona.]

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Section 11. The Legislature shall determine the number of each of the inferior courts in incorporated cities or towns, and in town-

ships, counties or cities and counties, according to the population thereof and the number of judges or justices thereof, and shall fix by law the powers, duties and responsibilities of each of such courts and of the judges or justices thereof; *provided,* such powers shall not in any case trench upon the jurisdiction of the several courts of record, except that the Legislature shall provide that said courts shall have concurrent jurisdiction with the Superior Courts in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars, and in cases to enforce and foreclose liens on personal property when neither the amount of liens nor the value of the property amounts to three hundred dollars.

Section 13. The Legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section one of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof.

2. Courts of original jurisdiction.

a. Police Courts.

(1) Organization.

Henning's General Laws (1914), p. 1400, 1403, 1410.

Cf. California Constitution, art. XI, § 8 and 8½.

(2) Jurisdiction.

Political Code, § 4424-4432.

Section 4426. The police court has exclusive jurisdiction of the following public offenses committed within the city boundaries:

1. Petty larceny;

2. Assault and battery, not charged to have been committed upon a public officer in the discharge of his official duty, or with intent to kill;

3. Breaches of the peace, riots, affrays, committing wilful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars or by imprisonment not exceeding six months, or by both such fine and imprisonment; and,

4. Of proceedings respecting vagrants, lewd, or disorderly persons.

Section 4427. The police court also has exclusive jurisdiction:

1. Of all proceedings for the violation of any ordinance of the city, both civil and criminal;

2. Of any action for the collection of taxes and assessments levied for city purposes; or for the erection or improvement of any schoolhouse or public buildings; for the laying out or opening or improving any public street or sidewalk, lane, alley, bridge, wharf, pier or dock; or for the purchase of or the improvement of any public grounds; or for any and all public improvements made and ordered by the city within its limits, when the amount of the tax or assessments sought to be collected against the person assessed is less than three hundred dollars; but no lien upon the property

taxed or assessed for the non-payment of the taxes or assessments can be foreclosed in any such action;

3. Of an action for the collection of money due to the city, or from the city to any person, when the amount sought to be collected, exclusive of interest and costs, is less than three hundred dollars;

4. For the breach of any official bond given by any city officer, and for the breach of any contract, and any action for damages in which the city is a party or is in any way interested; and all forfeited recognizances given to or for the benefit or in behalf of the city; and upon all bonds given upon any appeal taken from the judgment of the court in any action above named where the amount claimed, exclusive of costs, is less than three hundred dollars;

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(1) Organization.

Code of Civil Procedure, § 85-111.

(2) Jurisdiction.

(*a*) Criminal.

Penal Code, § 1425:—

The justices' courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

1. Petty larceny;

2. Assault or battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offense a felony;

3. Breaches of the peace, riots, routs, affrays, committing a wilful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.

(*b*) Civil.

Code of Civil Procedure, § 112-114.

Section 112. The justices' courts shall have civil jurisdiction:

1. In actions arising on contract for the recovery of money only if the sum claimed, exclusive of interest, does not amount to three hundred dollars;

2. In actions for damages for injury to the person, or for taking, detaining, or injuring personal property, or for injury to real property where no issue is raised by the verified answer of the defendant involving the title to or possession of the same, if the damage claimed does not amount to three hundred dollars;

3. In actions to recover the possession of personal property, if the value of such property does not amount to three hundred dollars;

4. In actions for a fine, penalty, or forfeiture, not amounting to three hundred dollars, given by statute, or the ordinance of an incorporated city and county, city, or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll or municipal fine;

5. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed does not amount to three hundred dollars, though the penalty may exceed that sum;

6. To take and enter judgment for the recovery of money on the confession of a defendant, when the amount confessed, exclusive of interest, does not amount to three hundred dollars.

Section 113. The justices' courts shall have concurrent jurisdiction with the superior courts within their respective townships:

1. In actions of forcible entry and detainer, where the rental value of the property entered upon or unlawfully detained does not exceed twenty-five dollars per month, and the whole amount of damages claimed does not exceed two hundred dollars;

2. In actions to enforce and foreclose liens on personal property, where neither the amount of the liens nor the value of the property amounts to three hundred dollars.

Section 114. Except as in the last preceding section provided, the jurisdiction of the justices' courts shall not, in any case, trench upon the jurisdiction of the several courts of record of the state, nor extend to any action or proceeding against ships, vessels, or boats, for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state.

c. Superior Courts.

(1) Organization.

California Constitution, art. VI, § 6-9:—

Section 6. There shall be in each of the organized counties, or cities and counties, of the State, a Superior Court, for each of which at least one judge shall be elected by the qualified electors of the county, or city and county, at the general State election; *provided,* that until otherwise ordered by the Legislature, only one judge shall be elected for the counties of Yuba and Sutter, and that in the City and County of San Francisco there shall be elected twelve Judges of the Superior Court, any one or more of whom may hold court. There may be as many sessions of said court, at the same time, as there are judges thereof. The said judges shall choose, from their own number, a presiding judge, who may be removed at their pleasure. He shall distribute the business of the court among the judges thereof, and prescribe the order of business. The judg-

ments, orders, and proceedings of any session of the Superior Court held by any one or more of the judges of said courts, respectively, shall be equally effectual as if all the judges of said respective courts presided at such session. In each of the counties of Sacramento, San Joaquin, Los Angeles, Sonoma, Santa Clara, and Alameda there shall be elected two such judges. The term of office of Judges of the Superior Courts shall be six years from and after the first Monday of January next succeeding their election; *provided,* that the twelve Judges of the Superior Court elected in the City and County of San Francisco, at the first election held under this Constitution, shall at their first meeting so classify themselves, by lot, that four of them shall go out of office at the end of two years, and four of them shall go out of office at the end of four years, and four of them shall go out of office at the end of six years, and an entry of such classification shall be made in the minutes of the court, signed by them, and a duplicate thereof filed in the office of the Secretary of State. The first election of Judges of the Superior Courts shall take place at the first general election held after the adoption and ratification of this Constitution. If a vacancy occur in the office of Judge of a Superior Court, the Governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Section 7. In any county, or city and county, other than the City and County of San Francisco, in which there shall be more than one Judge of the Superior Court, the judges of such court may hold as many sessions of said court at the same time as there are judges thereof, and shall apportion the business among themselves as equally as may be.

Section 8. A judge of any Superior Court may hold a Superior Court in any county, at the request of a Judge of the Superior Court thereof, and upon the request of the Governor it shall be his duty so to do. But a cause in the Superior Court may be tried by a judge pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, and sworn to try the cause, and the person so selected shall be empowered to act in such capacity in all further proceedings in any suit or proceedings tried before him until the final determination thereof. There may be as many sessions of a Superior Court at the same time as there are judges thereof, including any judge or judges acting upon request, or any judge or judges pro tempore. The judgments, orders, acts and proceedings of any session of any Superior Court held by one or more judges acting upon request, or judge or judges pro tempore, shall be equally effective as if the judge or all the judges of such court presided at such session.

Section 9. . . . The Legislature of the State may, at any time, two-thirds of the members of the Senate and two-thirds of the members of the Assembly voting therefor, in-

crease or diminish the number of Judges of the Superior Court in any county, or city and county, in the State; *provided,* that no such reduction shall affect any judge who has been elected.*

(2) Jurisdiction.

California Constitution, art. VI, § 5:—

The Superior Court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy amounts to three hundred dollars, and in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate; of divorce and for annulment of marriage; and of all such special cases and proceedings as are not otherwise provided for, and said court shall have the power of naturalization, and to issue papers therefor. They shall have appellate jurisdiction in such cases arising in inferior courts in their respective counties as may be prescribed by law. They shall be always open (legal holidays and non-judicial days excepted), and their process shall extend to all parts of the State; *provided,* that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated. Said courts, and their judges, shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus, on petition by or on behalf of any person in actual custody, in their respective counties. Injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days.

3. Courts of appellate jurisdiction.

a. District Courts of Appeal.

(1) Organization.

California Constitution, art. VI, § 4:—

. . . The State is hereby divided into three appellate districts, in each of which there shall be a District Court of Appeal consisting of three justices. The first district shall embrace the following counties: San Francisco, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, Fresno, Santa Cruz, Monterey, and San Benito.

The second district shall embrace the following counties: Tulare, Kings, San Luis Obispo, Kern, Inyo, Santa Barbara,

* By numerous acts of the Legislature the number of judges in the various counties has been changed from time to time. For a summary of these acts see Deering's Code of Civil Procedure (1915), Appendix, Title, "Courts."

Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego.

The third district shall embrace the following counties: Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Lake, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Sonoma, Napa, Yolo, Placer, Solano, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Stanislaus, Mariposa, Madera, Merced, Tuolumne, Alpine and Mono.

The Supreme Court, by orders entered in its minutes, may from time to time remove one or more counties from one appellate district to another, but no county not contiguous to another county of a district shall be added to such district.

Said District Courts of Appeal shall hold their regular sessions respectively at San Francisco, Los Angeles, and Sacramento, and they shall always be open for the transaction of business. . . .

The Justices of the District Courts of Appeal shall be elected by the qualified electors within their respective districts at the general state elections at the times and places at which Justices of the Supreme Court are elected. Their terms of office and salaries shall be the same as those of Justices of the Supreme Court, and their salaries shall be paid by the State. . . . If any vacancy occur in the office of a Justice of the District Courts of Appeal, the Governor shall appoint a person to hold office until the election and qualification of a justice to fill the vacancy; such election shall take place at the next succeeding general State election as aforesaid; the justice then elected shall hold the office for the unexpired term.

One of the justices of each of the District Courts of Appeal shall be the presiding justice thereof, and as such shall be appointed or elected as the case may be. The presence of three justices shall be necessary for the transaction of any business by such court, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. . . .

Whenever any Justice of a District Court of Appeal is for any reason disqualified or unable to act in any cause pending before it, the Supreme Court may appoint a Justice of the District Court of Appeal of another district, or a Judge of a Superior Court who has not acted in the cause in the court below, to act pro tempore in the place of the justice so disqualified or unable to act.

(2) Jurisdiction.

California Constitution, art. VI, § 4:—

. . . . The District Courts of Appeal shall have appellate jurisdiction on appeal from the Superior Courts in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars; also, in all cases of forcible and unlawful entry and detainer (except such as arise in Justices' Courts), in pro-

ceedings in insolvency, and in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, and prohibition, usurpation of office, contesting elections, and eminent domain, and in such other special proceedings as may be provided by law (excepting cases in which appellate jurisdiction is given to the Supreme Court); also, on questions of law alone, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered. The said courts shall also have appellate jurisdiction in all cases, matters and proceedings pending before the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district, or before any Superior Court within his district, or before any judge thereof.

b. Supreme Court.

(1) Organization.

California Constitution, art. VI:—

Section 2. The Supreme Court shall consist of a Chief Justice and six Associate Justices. The court may sit in departments and in bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The Chief Justice shall assign three of the Associate Justices to each department, and such assignment may be changed by him from time to time. The Associate Justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the Chief Justice. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The Chief Justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two Associate Justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or

after judgment by a department, order a case to be heard in bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the Chief Justice, in writing, with the concurrence of two Associate Justices. The Chief Justice may convene the court in bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in bank or in department, shall be given in writing, and the ground of the decision shall be stated. The Chief Justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the Chief Justice from the place at which the court is held, or his inability to act, the Associate Justices shall select one of their own number to perform the duties and exercise the powers of the Chief Justice during such absence or inability to act.

Section 3. The Chief Justice and the Associate Justices shall be elected by the qualified electors of the State at large at the general state elections, at the time and place at which state officers are elected; and the term of office shall be twelve years from and after the first Monday after the first day of January next succeeding their election; *provided,* that the six Associate Justices elected at the first election shall, at their first meeting, so classify themselves, by lot, that two of them shall go out of office at the end of four years, two of them at the end of eight years, and two of them at the end of twelve years, and an entry of such classification shall be made in the minutes of the court in bank, signed by them, and a duplicate thereof shall be filed in the office of the Secretary of State. If a vacancy occur in the office of a justice, the Governor shall appoint a person to hold the office until the election and qualification of a justice to fill the vacancy, which election shall take place at the next succeeding general election, and the justice so elected shall hold the office for the remainder of the unexpired term. The first election of the justices shall be at the first general election after the adoption and ratification of this Constitution.

(2) Jurisdiction.

California Constitution, art. VI, § 4:—

The Supreme Court shall have appellate jurisdiction on appeal from the Superior Courts in all cases in equity, except such as arise in Justices' Courts; also, in all cases at law which involve the title or possession of real estate, or

the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars; also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters, and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or before any District Court of Appeal, or before any judge thereof, or before any Superior Court in the State, or before any judge thereof. . . .

The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein. The judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced.

The Supreme Court shall have power to order causes pending before a District Court of Appeal for one district to be transferred to the District Court of Appeal of another district for hearing and decision. . . .

No appeal taken to the Supreme Court or to a District Court of Appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto.

All statutes now in force allowing, providing for, or regulating appeals to the Supreme Court shall apply to appeals to the District Courts of Appeal so far as such statutes are not inconsistent with this article and until the Legislature shall otherwise provide.

The Supreme Court shall make and adopt rules not inconsistent with law for the government of the Supreme Court and of the District Courts of Appeal and of the officers thereof, and for regulating the practice in said courts.

4. The court of impeachment.
California Constitution, art. VI, § 1 (quoted *supra*).

C. Procedure in civil causes in California—illustrated.

1. Forms of action.

C. C. P. 307. There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs.

2. Preliminaries:

a. Time within which an action may be commenced. C. C. P. 312-363.

b. Place in which an action may be tried. C. C. P. 392-400.

c. Parties entitled to bring and to defend an action. C. C. P. 367-390.

d. The court in which the action is to be brought.

3. Commencing and prosecuting an action.

a. Drawing and filing the complaint.

C. C. P. 426. The complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;

2. A statement of the facts constituting the cause of action in ordinary and concise language;

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

ILLUSTRATION OF A COMPLAINT.*

IN THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

No. 10,483. Dept. No. 5.

EMMA SEBRING,
Plaintiff,

vs.

L. HARRIS,
Defendant.

COMPLAINT

The plaintiff above named complains of the defendant above named, and for cause of action alleges:

1. That on the 22d day of June, 1907, at the city and county of San Francisco, State of California, the defendant caused the plaintiff to be arrested upon a pretended charge of larceny.

2. That said arrest was malicious and without probable cause.

3. That by reason of said arrest the defendant was detained in custody of the police officers about two hours, and was subjected to humiliation, and suffered great mental anguish, and suffered in her reputation for honesty and integrity to her damage in the sum of twenty-five thousand ($25,000) dollars.

* The illustrations of pleadings, motions, etc., are taken from the transcript on appeal in the case of Sebring v. Harris, which may be found in the law library in Vol. 129 of the California Courts of Appeal Records.

4. That after being kept in custody for said period of two hours, as aforesaid, said plaintiff was released and discharged from custody and said arrest and detention were entirely and finally terminated.

Wherefore plaintiff demands judgment against said defendant for said sum of twenty-five thousand ($25,000) dollars, together with her costs herein incurred.

W. M. CANNON,
Attorney for Plaintiff.

State of California, } ss.
City and County of San Francisco. }

Emma Sebring, being duly sworn, deposes and says: That she is the plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated on information and belief, and that as to those matters she believes it to be true.

EMMA SEBRING.

Subscribed and sworn to before me this 28th day of June, 1907.

[Seal] HENRY B. LISTER,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed): Filed June 25, 1907.

H. I. MULCREVY,
Clerk,
By H. I. PORTER,
Deputy Clerk.

b. Obtaining jurisdiction over the defendant—service of process—the summons. C. C. P. 406, 407, 410-416.

ILLUSTRATION OF SUMMONS.

(In this action the summons would run in substantially the following form):

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

EMMA SEBRING, Plaintiff,
vs.
L. HARRIS, Defendant.

Action brought in the Superior Court of the State of California in and for the City and County of San Francisco, and the complaint filed in the office of the clerk of said City and County of San Francisco.

THE PEOPLE OF THE STATE OF CALIFORNIA, send greeting to L. Harris of San Francisco, Defendant:

You are hereby directed to appear and answer the complaint in an action, entitled as above, brought against you in the Superior Court of the State of California, in and for the City and County of San Francisco, within ten days after the service on you of this summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or will apply to the court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the State of California, in and for the City and County of San Francisco, this twenty-fifth day of June, A. D. 1907.

[Seal]

H. I. MULCREVY,
Clerk.
By H. I. PORTER,
Deputy Clerk.

c. Pleadings.

(1) Definition of pleadings.

C. C. P. 420. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

(2) The complaint.

(See *supra C*, 3*a*.)

(3) Demurrer to the complaint.

(*a*) Nature of a demurrer.

(*b*) When defendant may demur.

C. C. P. 430. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant or the subject of the action;
2. That the plaintiff has not legal capacity to sue;
3. That there is another action pending between the same parties for the same cause;
4. That there is a defect or misjoinder of parties plaintiff or defendant;
5. That several causes of action have been improperly united or not separately stated;
6. That the complaint does not state facts sufficient to constitute a cause of action;
7. That the complaint is ambiguous;
8. That the complaint is unintelligible; or
9. That the complaint is uncertain.

ILLUSTRATION OF A DEMURRER

(Title of the court and cause.)

DEMURRER

Now comes the defendant above named and demurs to the complaint on file herein, and, for cause of demurrer, alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint does not state facts sufficient to entitle a re-

covery thereunder for the reason that there is no allegation in said complaint that said defendant did wrongfully and maliciously cause said plaintiff to be arrested or that said arrest was wrongful and malicious and caused by the defendant herein.

III.

That said complaint is uncertain for the reasons above set forth in paragraph II hereof.

Wherefore, defendant prays to be hence dismissed with his costs and disbursements.

HARRY E. MICHAEL,
Attorney for Defendant.

(Endorsed): Service of within demurrer acknowledged this 8th day of July, A. D. 1907.

W. M. CANNON,
Attorney for Plaintiff.

Filed July 8, 1907.

H. I. MULCREVY,
Clerk.
By J. J. GREIF,
Deputy Clerk.

(*c*) Hearing on demurrer.

ILLUSTRATION OF ORDER OVERRULING DEMURRER

(Title of the court and cause.)

MINUTE ORDER
OVERRULING DEMURRER TO COMPLAINT.

Friday, October 25, 1907.

Court met, present Hon. J. M. Seawell, Judge, and officers of Court.

In this cause, the demurrer of the defendant to the complaint on file herein came on regularly this day to be heard; thereupon upon motion of counsel for the plaintiff it is ordered that said demurrer be and the same is hereby overruled for want of prosecution, with leave to the defendant to answer said complaint within ten days.

(4) Answer.

(*a*) What answer shall contain.

C. C. P. 437. The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counter claim.

If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint.

ILLUSTRATION OF AN ANSWER.

(Title of the court and cause.)

ANSWER

Now comes the defendant above named, and for answer to the complaint of plaintiff on file herein—

Denies that on the 22d day of June, 1907, or at any other time, at San Francisco, State of California, or at any other place, or at all, defendant caused the plaintiff to be arrested upon a pretended charge of larceny, or upon any other charge;

Denies that said arrest was malicious or without probable cause;

Denies that by reason of said arrest the defendant was detained in custody of the police officers about two hours, or was subjected to humiliation or suffered great or any mental anguish, or suffered in her reputation for honesty or integrity to her damage in the sum of twenty-five thousand dollars, or in any sum or at all.

Denies that after being kept in custody for said period of two hours said plaintiff was released or discharged from custody, or said arrest or said detention were entirely or finally terminated, or at all.

Wherefore defendant prays that plaintiff take nothing by this action, and that he have judgment for his costs of suit.

HARRY E. MICHAEL,
Attorney for Defendant.

State of California, }
City and County of San Francisco. } ss.

L. Harris, being first duly sworn, deposes and says: That he is the defendant in the within-entitled action; that he has heard read the foregoing answer, and that the same is true of his own knowledge, except as to those matters which are therein stated upon his information and belief, and as to those matters that he believes it to be true.

L. HARRIS.

Subscribed and sworn to, before me, this 3d day of December, A. D. 1907.

[Seal] J. J. KERRIGAN,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed): Filed Dec. 3, 1907.

H. I. MULCREVY,
Clerk.
By D. J. SULLIVAN,
Deputy Clerk.

(5) Demurrer to the answer.

C. C. P. 444. The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined, or not separately stated;
2. That the answer does not state facts sufficient to constitute a defense or counterclaim;
3. That the answer is ambiguous;
4. That the answer is unintelligible; or
5. That the answer is uncertain.

d. The trial.

(1) Placing on the calendar. C. C. P. 593-596.

(2) The jury.

(*a*) When trial by jury is allowed.

C. C. P. 592. In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issues of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code.

(*b*) Formation of the jury—drawing, challenges, swearing in. Cf. C. C. P. 198-230, 600-604.

C. C. P. 198. A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. In possession of his natural faculties and of ordinary intelligence and not decrepit:

3. In possession of sufficient knowledge of the English language.

C. C. P. 199. A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding section;

2. Who has been convicted of malfeasance in office or any felony or other high crime; or

3. Who has been discharged as a juror by any court of record in this state within a year, as provided in section two hundred of this code, or who has been drawn as a grand juror in any such court and served as such within a year and been discharged.

4. A person who is serving as a grand juror in any court of record in this state is not competent to act as a trial juror in any such court.

And a person who is serving as a trial juror in any court of this state is not competent to act as a grand juror in any such court.

C. C. P. 200. A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, or military officer of the United States, or of this state;

2. A person holding a county, city and county, city, town or township office;

3. An attorney at law, or the clerk, secretary or stenographer of an attorney at law;

4. A minister of the gospel, or a priest of any denomination following his profession;
5. A teacher in a university, college, academy, or school;
6. A practicing physician, or druggist, actually engaged in the business of dispensing medicines;
7. An officer, keeper or attendant of an almshouse, hospital, asylum, or other charitable institution;
8. Engaged in the performance of duty as officer or attendant of the state prison or of a county jail;
9. Employed on board of a vessel navigating the waters of this state;
10. An express agent, mail carrier, or a superintendent, employee, or operator of a telegraph or telephone company doing a general telegraph or telephone business in this state, or keeper of a public ferry or toll-gate;
11. An active member of the national guard of California, or an active member of a paid fire department of any city and county, city, town, or village in this state, or an exempt member of a duly authorized fire company;
12. A superintendent, engineer, fireman, brakeman, motorman, or conductor on a railroad; or
13. A person drawn as a juror in any court of record in this state, upon a regular panel, who has served as such within a year, or a person drawn or summoned as a juror in any such court who has been discharged as a juror within a year as hereinafter provided; provided, however, that in counties having less than five thousand population the exemption provided by this subdivision shall not apply.

C. C. P. 201. A juror shall not be excused by a court for slight or trivial cause, or for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence.

C. C. P. 204. In the month of January in each year it shall be the duty of the superior court in each of the counties of this state to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the trial of causes therein, during the ensuing year; and immediately after said order designating the estimated number of grand jurors shall be made, the court shall select and list the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year, or until new lists of jurors shall be provided; and said selections and listings shall be made of persons suitable and competent to serve as jurors, as set forth and required in sections two hundred and five and two hundred and six of this code, which list of persons so selected shall at once be placed in the possession of the county clerk; and immediately after said order designating the estimated number of trial jurors shall be made, the board of supervisors shall select, as provided in sections two hundred and five and

two hundred and six of this code, a list of persons to serve as trial jurors in the superior court of said county during the ensuing year, or until a new list of jurors shall be provided. In counties, and cities and counties having a population of one hundred thousand inhabitants or over, such selections shall be made by a majority of the judges of the superior court.

C. C. P. 205. The selections and listings shall be made of persons suitable and competent to serve as jurors, and in making such selections they shall take the names of such only as are not exempt from serving, who are in the possession of their natural faculties, and not infirm or decrepit, of fair character and approved integrity, and of sound judgment.

C. C. P. 206. The lists of jurors, to be made as provided in the preceding section, shall contain the number of persons which shall have been designated by the court in its order. The names for such lists shall be selected from the different wards or townships of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making said lists; and said lists shall be kept separate and distinct one from the other.

C. C. P. 208. A certified list of the persons selected to serve as trial jurors shall at once be placed in the possession of and filed with the clerk of the superior court.

C. C. P. 209. On receiving such lists the county clerk shall file the same in his office, and write down the names contained thereon on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon. He shall deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box to be called the "grand-jury box," and those having on them the names of the persons selected to serve as trial jurors in a box to be called the "trial-jury box."

C. C. P. 210. The persons whose names are so returned shall be known as regular jurors, and shall serve for one year and until other persons are selected and returned.

C. C. P. 211. The names of persons drawn for grand jurors shall be drawn from the "grand-jury box," and the names of persons for trial jurors shall be drawn from the "trial-jury box"; and if, at the end of the year, there shall be the names of persons in either of the said jury-boxes who may not have been drawn during the year to serve, and have not served as jurors, the names of such persons may be placed on the list of jurors drawn for the succeeding year.

C. C. P. 214. Whenever the business of the superior court shall require the attendance of a trial jury for the trial of criminal cases, or where a trial jury shall have been demanded in any cause or causes at issue in said court, and no jury is in attendance, the court may make an order directing a trial jury to be drawn, and summoned to attend

before said court. Such order shall specify the number of jurors to be drawn, and the time at which the jurors are required to attend. And the court may direct that such causes, either criminal or civil, in which a jury may be required, or in which a jury may have been demanded, be continued, and fixed for trial when a jury shall be in attendance.

C. C. P. 215. Immediately upon the order mentioned in the preceding section being made, the clerk shall, in the presence of the court, proceed to draw the jurors from the "trial-jury box."

C. C. P. 219. The clerk must conduct said drawing as follows:

1. He must shake the box containing the names of the trial jurors so as to mix the slips of paper upon which such names are written as well as possible; he must then draw from said box as many slips of paper as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the name on each slip of paper so drawn from said jury-box.

3. If the name of any person is drawn from said box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and the slip of paper having such name on it shall be destroyed and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary until the whole number of jurors required be drawn. After the drawing shall be completed, the clerk shall make a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order, and of the drawing, and the number of the jurors drawn, and the time when, and the place where such jurors are required to appear. Such certificate and list shall be delivered to the sheriff for service.

C. C. P. 220. After a drawing of persons to serve as jurors, the clerk shall preserve the ballots drawn, and at the close of the session or sessions for which the drawing was had, he shall replace in the proper box from which they were taken all ballots which have on them the names of persons who did not serve as jurors for the session or sessions aforesaid, and who were not exempt or incompetent.

C. C. P. 225. The sheriff, as soon as he receives the list or lists of jurors drawn, shall summon the persons named therein to attend the court at the opening of the regular session thereof, or at such session or time as the court may order, by giving personal notice to that effect to each of them, or by leaving a written notice to that effect at his place of residence, with some person of proper age, or by mailing such notice by registered mail, and shall return the list to the court at the opening of the regular session there-

of, or at such session or time as the jurors may be ordered to attend, specifying the names of those who were summoned, and the manner in which each person was notified.

C. C. P. 226. Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered in its minutes, direct the sheriff, or an elisor chosen by the court, forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors, as may be required, and in either case such jurors must be summoned in the manner provided in the preceding section.

C. C. P. 227. When there are not competent jurors enough present to form a panel the court may direct the sheriff, or an elisor chosen by the court, to summon a sufficient number of persons having the qualifications of jurors to complete the panel from the body of the county, or city and county, and not from the bystanders; and the sheriff or elisor shall summon the number so ordered accordingly and return the names to the court.

C. C. P. 600. When the action is called for trial by jury, the clerk must draw from the trial-jury box of the court the ballots containing the names of the jurors, until the jury is completed, or the ballots are exhausted.

C. C. P. 601. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

C. C. P. 602. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this code to render a person competent as a juror;

2. Consanguinity or affinity within the fourth degree to any party, or to an officer of a corporation, which is a party:

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, or debtor and creditor, to either party, or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of the capital stock of a corporation which is a party.

4. Having served as a juror in a civil action or been a witness on a previous trial between the same parties, for the same cause of action; or having served as a juror within one year previously in any civil action or proceeding in which either party was plaintiff or defendant.

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

6. Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

7. The existence of a state of mind in the juror evincing enmity against or bias to either party.

8. That he is a party to an action pending in the court for which he is drawn and which action is set for trial before the panel of which he is a member.

C. C. P. 603. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

C. C. P. 604. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ———, the plaintiff, and ———, defendant, and a true verdict render according to the evidence.

(3) Conduct of the trial.

C. C. P. 607. When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part;

2. The defendant may then open his defense, and offer his evidence in support thereof;

3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

4. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument.

5. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;

6. The court may then charge the jury.

(*a*) Introduction of evidence. C. C. P. 2042-2045.

(i) Definition of evidence and proof:

C. C. P. 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

C. C. P. 1824. Proof is the effect of evidence, the establishment of a fact by evidence.

(ii) Kinds of evidence.

C. C. P. 1827. There are four kinds of evidence:

1. The knowledge of the court;

2. The testimony of witnesses;

3. Writings;

4. Other material objects presented to the senses.

(iii) Definition of the law of evidence:

C. C. P. 1825. The law of evidence which is the subject of this part of the code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;

2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,

3. For the production of legal evidence;

4. For the exclusion of whatever is not legal;

5. For determining, in certain cases, the value and effect of evidence.

(*b*) Exceptions.

C. C. P. 646. An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. . . .

(*c*) Motion for nonsuit.

C. C. P. 581. An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

. . . 5. By the court upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.

ILLUSTRATION OF MOTION AND RULING OF THE COURT.

Mr. *Michael.* I desire to make the motion for nonsuit on the ground that they have not established any cause of action at all. They have not shown any connection with Mr. Harris. Also they must show that there was a want of probable cause; and on the ground that the testimony so far introduced by the plaintiff does not substantiate anything at all connecting the defendant with the matter.

THE COURT. The motion will be denied, and an exception to the defendant.

(*d*) Arguments to the jury.

(*e*) The court's charge to the jury.

C. C. P. 608. In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.

ILLUSTRATION OF INSTRUCTIONS

The following instructions (*inter alia*) were given by the court in the case under consideration:

Gentlemen: The complaint in this case charges that on the 22d of June, 1907, in this city, the defendant caused plaintiff to be arrested upon a pretended charge of larceny; that the arrest was malicious and without probable cause; that by reason of the arrest she was detained about two hours, was subjected to humiliation and mental anguish, and sustained damages in the sum of $25,000.00, in which sum relief is demanded.

While the complaint here does allege that the arrest was malicious and without probable cause, the plaintiff, in order to maintain her action, is not bound to prove that allegation.

In as much as you have heard a great deal of testimony in regard to the public offense called and known as "disturbing the peace," or as it is defined in the law "disturbance of the peace," it might be well for me to read you the definition of what constitutes that offense.

Section 415 of the Penal Code of this state provides, under the head of disturbing the peace: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, . . . is guilty of a misdemeanor (disturbance of the peace) . . . and shall be punished by fine . . . or by imprisonment in the county jail."

Now, in this case, if you should find that the defendant caused the arrest of plaintiff upon the charge that she had committed a larceny, then the defendant, having offered no evidence in support of such charge, it would be your duty to find a verdict in favor of the plaintiff.

If you should find, however, that the defendant requested the arrest of this plaintiff upon the charge of disturbing the peace, and if you find that at, and prior to, the time that he made such a request of the officer, she was guilty of disturbing the peace, then it will be your duty to find a verdict in favor of the defendant. It is therefore important for you at the very outset of the case, to determine what charge, if any, the defendant made against the plaintiff.

If you should find from the evidence that the defendant made no request for her arrest, made no demand that she should be taken into custody at all, but that the officer, of his own motion and volition, took her into custody, and imprisoned her, then the defendant would be entitled to a verdict at your hands.

But if you should find that she was arrested at the instigation, and upon the procurement of the defendant, upon a charge of disturbing the peace, and that she was guiltless of that offense, that is to say, that she had not been disturbing the peace, then it would be your duty to find a verdict in favor of the plaintiff.

The issues in this case have been fully disclosed to you by the various counsel, and consequently I have not given such portions of the instructions as were intended to review those issues. I think you fully understand after listening to three arguments, and the opening words of counsel for the plaintiff and the defendant, what those issues are.

The burden of proof, of showing the alleged false imprisonment, rests upon the plaintiff. But if she has established that cause of ac-

tion, that is to say, if you are satisfied that she has proved that the defendant forcibly and illegally caused the imprisonment of the plaintiff, then upon the defendant falls the duty, and upon him rests the burden of excusing or justifying his act.

One may justify an action in causing the arrest of another by showing that he had probable cause therefor, that is, such cause as will justify a reasonable man in believing that the particular offense charged existed.

Or, it may be that where the evidence establishes a false imprisonment, and evidence is offered by the defendant for the purpose of showing probable cause for such false imprisonment, and if the evidence thus offered to show probable cause, should fall short of proving justification of the imprisonment, the jury may still, in their discretion, if they see fit, consider the facts thus offered in mitigation of damages.

You are not to be in any way influenced, gentlemen, by the action of the court, as I have had occasion to say to you before, in passing upon the motion for nonsuit. The court in passing upon the motion for nonsuit, as I have had frequent occasion to state, is not in any wise determining the case, but is simply resolving that the case should go to the jury for their consideration and their attention.

Therefore in your deliberations you are not to be influenced in any manner by my action in that regard.

If you should find that the plaintiff is not entitled to recover, it will be your duty to sign a verdict which reads: "We, the jury, find a verdict in favor of the defendant."

If you should find that the plaintiff is entitled to recover in this case, then the instructions which I have read to you, according to my view of the law, give you the elements which you are to consider in determining the amount of damages to be awarded.

If you should conclude to award damages, however, the law requires that such damages must be reasonable in amount.

You are not to be influenced in the consideration of this in any wise by either sympathy for one party, or indignation or prejudice against another. You are to consider the case in a fair-minded, impartial way, and to do as you would be done by under similar circumstances. . . .

. . . If you find that the defendant was guilty of a false imprisonment of the plaintiff, I instruct you that the plaintiff is entitled to have awarded to her compensation for such false imprisonment, which compensation is called damages.

If you decide to find a verdict in favor of the plaintiff, I instruct you that in estimating damages you are entitled to take into consideration the circumstances surrounding the alleged arrest and imprisonment and are entitled to consider whether the plaintiff was subjected to humiliation or suffered great or any mental anguish by reason of such arrest and detention, and after due consideration of all such acts and circumstances, you should award her such a sum as damages as may be reasonable, and such a sum as will fairly compensate her for the detriment proximately caused by such arrest and imprisonment.

(*f*) Deliberation of the jury.
Cf. C.C.P. 612-619.

e. The verdict. Cf. C. C. P. 624-628.

ILLUSTRATION OF A VERDICT.

(Title of the court and cause.)

VERDICT

November 11th, A. D. 1909.

We, the jury in the above-entitled cause, find a verdict in favor of the plaintiff and against the defendant for the sum of one thousand and 00/100 ($1000.00) dollars damages.

M. J. LINEHAN,
Foreman.

(Endorsed): Filed Nov. 11, 1909.

H. I. MULCREVY,
Clerk.

By J. J. McDONALD,
Deputy Clerk.

f. The judgment. Cf. C. C. P. 577-585, 664-680½.

C. C. P. 577. A judgment is the final determination of the rights of the parties in an action or proceeding.

C. C. P. 664. When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision. In no case is a judgment effectual for any purpose until so entered.

ILLUSTRATION OF A JUDGMENT.

(Title of the court and cause.)

JUDGMENT ON VERDICT

This cause came on regularly for trial, William M. Cannon, Esq., appearing as counsel for the plaintiff, and Harry E. Michael, Esq., for the defendant.

Thereupon, a jury of twelve persons was duly accepted, empaneled and sworn to try said cause. Witnesses on the part of the plaintiff and defendant were duly sworn and examined, and documentary evidence introduced.

Whereupon, after hearing the evidence, the arguments of counsel and instructions of the court, the cause was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, and, being called, all answered to their names, and then rendered the following verdict, which was accepted by the court and entered on the minutes, as follows:

We, the jury in the above-entitled cause, find a verdict in favor of plaintiff and against defendant for the sum of one thousand and 00/100 ($1000.00) dollars damages.

M. J. LINEHAN,
Foreman.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that Emma Sebring, plaintiff, do have and recover of and from L. Harris, defendant, the

sum of one thousand 00/100 ($1000.00) dollars, with interest thereon at the rate of seven per cent per annum from the date hereof till paid, together with said plaintiff's costs and disbursements, incurred herein, amounting to the sum of $.....

Judgment entered November 12th, 1909, book 7, page 162. D. 11-12-09.

4. Provisional remedies—purpose, to secure payment of the judgment or preserve the *status quo*.
   - *a*. Attachment. Cf. C. C. P. 537-560.
   - *b*. Arrest and bail. Cf. C. C. P. 478-504.
   - *c*. Injunction. Cf. C. C. P. 525-533.
   - *d*. Claim and delivery. Cf. C. C. P. 509-520.
   - *e*. Lis pendens, Cf. C. C. P. 409.
   - *f*. Receivers. Cf. C. C. P. 564-569.
   - *g*. Deposit in court. Cf. C. C. P. 572-574.
5. Proceedings subsequent to the judgment.
   - *a*. To secure its execution. Cf. C. C. P. 681-721.
   - *b*. To reimburse the successful litigant. Cf. C. C. P. 1021-1039.
   - *c*. To avoid, amend or reverse the judgment.
     - (1) Motion for new trial.
       - (*a*) New trial defined.

C. C. P. 656. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee.

       - (*b*) When a new trial may be granted.

C. C. P. 657. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law;

7. Error in law, occurring at the trial and excepted to by the party making the application.

(2) Vacation of judgment.

C. C. P. 663. A judgment or decree of a superior court, when based upon findings of fact made by the court, or by the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment:

1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be amended and corrected.

2. A judgment or decree not consistent with or not supported by the special verdict.

(3) Appeal. Cf. C. C. P. 936-980.

Appellate jurisdiction of the Supreme Court and of the District Courts of Appeal. Cf. Constitution of California, art. VI, § 4 (quoted on pages 24-25 and 26-27, *supra*).

C. C. P. 938. Any party aggrieved may appeal in the cases prescribed in this title. The party appealing is known as the appellant, and the adverse party as the respondent.

C. C. P. 956. Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken.

6. The report of the decision of the appellate court. Cf. California Constitution, art. VI, § 24, § 16.

[Civ. No. 980. First Appellate District—October 4, 1912.]

*EMMA SEBRING, Respondent, v. L. HARRIS, Appellant.

FALSE ARREST AND IMPRISONMENT—ACTION FOR DAMAGES—MOTION FOR NONSUIT PROPERLY DENIED.—In an action for damages for a false arrest and imprisonment of the plaintiff, where evidence for the plaintiff conclusively established that the defendant did cause the arrest of the plaintiff, a motion for a nonsuit directed to a failure to prove that the defendant caused the arrest of the plaintiff at all, and a failure to prove want of probable cause, was properly denied.

Id.—QUESTION OF PROBABLE CAUSE—BURDEN OF PROOF UPON DEFENDANT.—The plaintiff is not required to prove a want of probable cause for the alleged false arrest and imprisonment, but the burden is upon the defendant to show that the arrest and imprisonment were made upon probable cause therefor.

Id.—FAILURE TO PROVE CAUSE OF ARREST ALLEGED—VARIANCE NOT EXPRESSED AS GROUND FOR NONSUIT.—The court cannot grant a nonsuit on a

* This decision will be found in 20 California Appellate Reports, 56.

ground of variance between the proof and the complaint, where no such ground of nonsuit was expressed in the motion therefor. Only the grounds expressed in the motion for a nonsuit can be considered in determining the motion. Especially does this rule apply where an amendment could have been allowed to the pleadings, which would have obviated the objection urged upon appeal, as a ground for nonsuit, for such variance.

Id.—VARIANCE AS TO GROUND OF ARREST BETWEEN COMPLAINT AND PROOF IMMATERIAL—PROPER INSTRUCTIONS.—Where the complaint alleged a false arrest and imprisonment upon a charge of larceny, and the evidence was conflicting as to whether the arrest was upon that ground, or upon a charge of disturbing the peace, the court properly gave instructions applicable to both theories of the case. The variance between the complaint and the proof can not be considered material under the law of this state, whatever may be the rule in other jurisdictions.

Id.—GIST OF ACTION—WRONGFUL ARREST—CHARGE INCIDENTAL—PROPER MODE OF DENIAL.—The gist of the action was the wrongful arrest. The charge upon which the arrest was made was but an incidental matter, peculiarly within the knowledge of the defendant, and need not have been alleged by the plaintiff. A denial that the arrest was made upon a charge of larceny would not have met the gist and substance of the allegation of the complaint, which the defendant recognized by denying that he caused the plaintiff, to be arrested upon a pretended charge of larceny, or *upon any other charge.*

Id.—EVIDENCE AS TO ARREST FOR DISTURBING PEACE PERTINENT TO ISSUES RAISED BY ANSWER.—The evidence as to an arrest for disturbing the peace was addressed to the issue presented by the denials in defendant's answer; and an instruction predicated upon the different theories of the case, as shown under the complaint and answer, was pertinent to the issues, as well as to the evidence before the jury, and no amendment was required in such case to conform to the proof.

Id.—APPROPRIATE INSTRUCTION AS TO DAMAGES, INCLUDING HUMILIATION AND MENTAL ANGUISH.—Where it is alleged and proved that the false arrest and imprisonment of the plaintiff, as a woman, caused her great humiliation and mental anguish, an instruction was proper that the jury might consider those elements in fixing damages by reason of such arrest and imprisonment.

Id.—MOTION FOR NEW TRIAL—APPEAL FROM ORDER—QUESTION OF EXCESSIVE DAMAGES NOT RAISED.—Where the appeal is limited to the review of an order denying a motion for a new trial, and no question of excessive damages was presented or urged as a ground for the motion, no such question could be considered by the trial court in passing upon the motion, or be reviewed upon appeal from the order denying the motion, but such order must be affirmed.

Appeal from an order of the Superior Court of the City and County of San Francisco, denying a motion for a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Henry Ach, Harry E. Michael, and *Wm. Hoff Cook,* for Appellant.

William M. Cannon, for Respondent.

HALL, J. This is an appeal from an order denying defendant's motion for a new trial.

The action was brought to recover damages for the wrongful and false arrest and imprisonment of plaintiff caused and procured by defendant.

Among other things it is alleged in the complaint "That on the 22d day of June, 1907, at the city and county of San Francisco, state of California, the defendant caused the plaintiff to be arrested upon a pretended charge of larceny."

Defendant in his answer denied that he "caused the plaintiff to be arrested upon a pretended charge of larceny, or upon any other charge."

At the close of plaintiff's case defendant moved the court for a nonsuit, which motion was by the court denied. This ruling of the court is the first matter urged by appellant as ground for the reversal of the order denying his motion for a new trial.

The only contention of appellant upon this point is that the evidence tends to show that the defendant caused plaintiff's arrest upon a charge of disturbing the peace instead of upon a charge of larceny, and which appellant contends presented a case of fatal variance between the proof and allegations of the complaint. As will appear later on in this opinion, we do not think the variance at all material. But it is a sufficient answer to appellant's contention to say that the motion for a nonsuit was not made upon any such ground. The motion as it appears in the record is as follows:

"I desire to make the motion for nonsuit on the ground that they have not established any cause of action at all. They have not shown any connection with Mr. Harris. Also they must show that there was a want of probable cause, and on the ground that the testimony so far introduced by the plaintiff does not substantiate anything at all connecting the defendant with the matter."

It is perfectly clear that appellant's motion was directed to a failure to prove that defendant caused the arrest of plaintiff at all, and to a failure to prove want of probable cause for the arrest.

As to the first of these grounds the evidence in the record establishes beyond question that the defendant did cause the arrest of plaintiff. It is not now contended to the contrary.

As to the second ground, the arrest being shown, the burden of proving probable cause is upon the defendant. (Ah Fond v. Sternes, 79 Cal. 30, [21 Pac. 381]; People v. McGrew, 77 Cal. 570, [20 Pac. 92].)

The ground relied upon for a nonsuit should be stated to the trial court. (Miller v. Luco, 80 Cal. 257, [22 Pac. 195]; Loring v. Stuart, 79 Cal. 200, [21 Pac. 651].)

Especially does this rule apply where, as in this case, an amendment could have been allowed to the pleadings, which would have obviated the objection now made by the appellant, and without possible inconvenience or injustice to the defendant. (Daley v. Russ, 86 Cal. 114, [24 Pac. 867].)

The court did not err in denying appellant's motion for a nonsuit.

Upon the trial there was some conflict in the evidence as to whether the arrest, which the evidence clearly shows defendant caused to be made, of plaintiff was upon a charge of larceny or upon a charge of disturbing the peace. There is in the record evidence to support either theory. The court gave instructions addressed to both theories.

Appellant contends that the instruction which the court gave to the effect that a verdict for plaintiff might be rendered if it appeared that defendant caused the arrest of plaintiff upon a charge of disturbing the peace, was error. It is not contended that the instruction is incorrect in the abstract, but that it was error to give an instruction upon such a theory of the case because of the allegation in the complaint that the arrest was upon a charge of larceny. In other words, it is claimed that the evidence and theory upon which the instruction was predicated presents a case of a material variance between the allegations of the complaint and the proof. We do not think so. It may be true that in some jurisdictions it would be so considered, but we do not think that it should be so considered under the law of this state.

The gist of the action in this case was the wrongful arrest. The charge upon which the arrest was made was but an incidental matter, peculiarly within the knowledge of defendant, and need not have been alleged by plaintiff. A denial that the arrest was made upon a charge of larceny would not have met the gist and substance of the allegation of the complaint. This defendant recognized by denying, as he did, that he caused the plaintiff to be arrested upon a pretended charge of larceny or *upon any other charge*.

By this denial he challenged proof that he had caused the arrest of plaintiff upon any charge whatever. The evidence tending to show an arrest upon a charge of disturbing the peace, was addressed to the issue presented by the denials in defendant's answer; and the instruction predicated upon the theory of the case resting upon such evidence was thus pertinent both to the evidence before the jury and court, and the issues presented by the pleadings.

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just." (Code Civ. Proc., § 469.)

That the defendant was in no respect misled by the variance between the allegation in the complaint and the proof is perfectly clear, for he went to trial upon the issue as to whether or not he had caused the arrest of plaintiff upon any charge at all.

It is thus clear that the variance now complained of as a foundation for the attack upon the instruction was not material and the court was not even required to direct an amendment to the pleading to conform to the proof. (Code Civ. Proc., § 470.)

The proof was addressed to the issue framed by the pleadings, and the instruction was pertinent both to the issue thus presented and the evidence bearing thereon. The cause of action proved under either theory of the facts was in substance the one alleged. The court therefore did not err in giving the instruction complained of.

It is next urged that the court erred in an instruction which it gave upon the question of damages.

Stress seems to be laid upon that portion of the instruction in which the jury were told that they were entitled to consider whether the plaintiff was subjected to humiliation or suffered great or any mental anguish by reason of such arrest.

Where it is alleged, and the proof is sufficient to support such allegation, that the arrest was malicious, no reason occurs to us why humiliation and mental anguish caused by such arrest are not proper elements to be considered by the jury in fixing damages for such arrest. The evidence shows that defendant directed two police officers to arrest plaintiff. They arrested her accordingly, and took her to a fire-engine house through a crowd of several hundred persons. There they detained her for about an hour pending the arrival of the police patrol wagon. Upon its arrival, however, upon her protest she was not taken to the police station in the wagon, but was allowed to walk there, escorted for a part of the way by a fireman, and for the remainder of the way by two police officers. She was detained for a time at the police station, but was eventually released without any charge being preferred against her. That humiliation and mental anguish to a woman would be the natural and proximate result of such an arrest goes without saying. The instruction was correct in the abstract, and was justified by the evidence in the record.

The only other point raised by appellant is that the damages awarded by the jury are excessive. This point was first raised at the oral argument. It was not even stated as ground for the motion in the notice of intention to move for a new trial, and therefore could not be considered by the trial court upon the hearing of the motion for a new trial. (Code Civ. Proc., § 659.)

The court did not err in denying appellant's motion for a new trial, and the order appealed from is therefore affirmed.

LENNON, P. J., and KERRIGAN, J., concurred.

CHAPTER IV.

The Content, Classification and Determination of Rules and Principles of Law.

I. The content of rules and principles of law—the definition of legal rights and duties.

References:

Pound, p. 410-427.
Holland: Jurisprudence, p. 78-346.
Salmond: Jurisprudence, p. 180-221.

A. Nature of a legal right.

B. Elements of a legal right.

1. The person in whom it resides.
2. The person against whom it is available—herein of legal duties.
3. The object with respect to which it is exercised.
4. The acts or forbearances which the person in whom the right resides is entitled to exact.

C. Classification of legal rights.

1. Rights in rem and rights in personam.
2. Antecedent and remedial rights.

II. Classification of the rules and principles of law.

References:

Salmond: Jurisprudence, p. 443-446, 489-493.
Holland: Jurisprudence, ch. ix.
Huston: "Law—Its Origin, Nature and Development," Modern American Law, I, p. 87-90.

A. Conflict between logical and practical considerations in classifying the law.

B. Substantive and adjective law.

C. International and national law.

1. International law.
2. National law.
   a. Public law—substantive and adjective.
      (1) Constitutional law.
      (2) Administrative law.
      (3) Criminal law.
   b. Private law—substantive and adjective.
      (1) Law of persons.

(*a*) Classes of persons.
i. Natural persons.
(*aa*) Normal.
(*bb*) Abnormal.
(i) Infants.
(ii) Married women.
(iii) Insane persons.
(iv) Aliens, etc.
ii. Juristic persons.
(*aa*) Corporations.
(i) Municipal corporations.
(ii) Private corporations.
(*b*) Law relating to personal rights.
(2) Law of property.
(*a*) Kinds of property.
i. Corporeal and incorporeal property.
ii. Movable and immovable property.
iii. Real and personal property.
(*b*) Law relating to the acquisition, enjoyment, transfer, and extinguishment of rights in property.
(3) Law of obligations.
(*a*) Contractual obligations.
i. In general.
ii. Special contractual obligations.
(*aa*) Insurance.
(*bb*) Negotiable Instruments.
(*cc*) Agency, etc.
(*b*) Quasi-contractual obligations.
(*c*) Fiduciary obligations.
(*d*) Delictual obligations.

III. Determination of rules and principles of law.

References:

Black: Law of Judicial Precedents, ch. i-iii, vi, vii-xi.
Wambaugh: Study of the Cases, ch. i-iii, v-vii, ix.
Brief Making, (3d edition), ch. xix-xxiii.

A. From constitutions and statutes.

Reference:

Pound, p. 97-103, 211-227.

B. From judicial decisions.

Reference:

Pound, p. 227-252.

1. Importance of judicial decisions in this regard.
2. The doctrine of *stare decisis*, and its importance in Anglo-American law. Herein of judicial law making.

3. Parts of a reported case.
   a. Title.
   b. Syllabus or headnote.
   c. Statement of facts.
   d. Arguments of counsel.
   e. Opinion of the court.
   f. Decision of the court.
   g. Judgment of the court.
4. Abstracting.
   a. Title—names of parties, date, court and where reported.
   b. Statement of facts.
   c. How the case came before the court.
   d. The question presented for decision.
   e. The decision, reasons therefor, and by whom rendered.
   f. The judgment or decree.
5. Judicial decisions as precedents.
   a. The authoritative element in a case—its doctrine.
      (1) Determining the doctrine.
      (2) Distinguishing dicta.
   b. Circumstances affecting the weight of a decision as a precedent.
      (1) Comparative weight of home and foreign decisions. Herein of imperative and persuasive authority in general.
      (2) Later history of the decision. Herein of the reversing and overruling of decisions.
      (3) Changing and different conditions.
      (4) Nature of the report.
      (5) Standing and rank of the court and judge.
      (6) Unanimity of the court.
      (7) Thoroughness of the argument.
      (8) Reasoning of the opinion and authorities relied upon.
6. Combining and comparing decisions to determine rules and principles of law.

End of the Syllabus

CHAPTER V.

Legal Bibliography.

I. Books of primary authority.
- *A.* Constitutions.
  - 1. Federal.
  - 2. State.
- *B.* Treaties.
- *C.* Statutes.
  - 1. Federal.
    - *a.* Statutes of the United States.
    - *b.* United States Statutes at Large.
    - *c.* Revised Statutes of the United States.
    - *d.* Compiled Statutes of the United States.
    - *e.* Federal Statutes Annotated.
  - 2. State.
    - *a.* In general.
      - (1) Session laws.
      - (2) Compiled statutes.
      - (3) Revised statutes.
      - (4) Codes.
    - *b.* California.
      - (1) Political Code.
      - (2) Penal Code.
      - (3) Civil Code.
      - (4) Code of Civil Procedure.
      - (5) General Laws.
      - (6) Statutes and Amendments to the Codes of California.
  - 3. English and Colonial.
    - *a.* English.
      - (1) Statutes at Large (1225-1869).
      - (2) Law Journal—Statutes (1823-date).
      - (3) Law Reports—Statutes (1866-date).
      - (4) Statutory Rules and Orders, Revised to December 31, 1903; Annual Supplements to date.
    - *b.* Colonial.

D. Reports of Judicial Decisions.
1. Regular reports.
a. Federal reports.
(1) Supreme Court.
(*a*) Official.
(*b*) Non-official.
i. United States Reports, Lawyer's Edition.
ii. Supreme Court Reporter.
(2) Lower Federal Courts.
(*a*) Federal Reporter.
(*b*) Federal Cases.
(3) Special Federal Courts and Commissions.
b. State reports.
(1) Official.
(2) Non-official.
The National Reporter System.
c. English Reports.
(1) The Year-Books.
(2) Private reports.
(3) The Law Reports.
(*a*) 1865-1875.
(*b*) 1875-1880.
(*c*) 1881-1890.
(*d*) 1891-date.
(4) English Reports—Full Reprint.
(5) Reports by periodicals.
(*a*) Law Journal Reports (1823-date).
(*b*) Law Times Reports (New series, 1859-date).
(*c*) Times Law Reports (1884-date).
(*d*) Weekly Reporter (1852-1906).
(*e*) The Jurist (1837-1866).
d. English colonial reports.
2. Special reports.
3. Selected Cases.
a. "Trinity Series."
(1) American Decisions.
(2) American Reports.
(3) American State Reports.
b. American Annotated Cases.
c. Lawyers Reports Annotated.
II. Books of secondary authority.
A. Text-books.

B. Encyclopedias.
1. The American and English Encyclopedia of Law, and the Encyclopedia of Pleading and Practice.
2. Cyclopedia of Law and Procedure.
3. Corpus Juris.
4. Ruling Case Law.
5. The Laws of England.

C. Law dictionaries.

D. Periodicals.

III. Search-books.

A. Digests.
1. American.
a. General.
The American Digest System.
(1) Century Edition.
(2) Decennial Edition.
(3) Key Number Series.
(4) Monthly advance sheets.
b. Local.
c. Special.
2. English.

B. Annotations.
1. Rose's Notes on the United States Reports.
2. Notes on California Reports.
3. L. R. A. Cases as Authorities.
4. Cyc. Annotations.
5. English Overruled Cases, etc.

C. Indices.
1. Indices to text-books.
2. Indices to Statutes—Davis's Index to the Laws of California.
3. Index and Concordance to Cyc.
4. Descriptive-Word Index.
5. Indices to notes of the various series of selected cases; etc.

D. Citators.
1. Shepard's citators.

E. Tables of cases and statutes—
1. of cases reported;
2. of cases cited—
a. in reports;
b. in text-books.
3. of cases affirmed, reversed or modified;
4. of statutes construed;
5. of cases digested, etc.
6. Decennial Table of Cases.

PART II.—SELECT CASES ON THE LAW OF PRIVATE NUISANCE

CHAPTER I.
What Constitutes a Nuisance.

MORLEY v. PRAGNEL

COURT OF KING'S BENCH. 1638.

[*Croke's Reports (Temp. Charles I)* 510.]

Action on the case. Whereas the plaintiff is owner of a common inn in Eastgestock, that the defendant maliciously erected a tallow-furnace, and boiled therein much stinking tallow, to the great annoyance of him and his guests; and by reason of such stench, arising thereupon, many of his guests left his house, and many of his family became unhealthful. Upon not guilty pleaded, a verdict was found for the plaintiff.

Germyn, Serjt., moved in arrest of judgment, that an action lies not, for he, being a tallow-chandler, ought to use his trade, which cannot be said to be a nuisance.

But all the COURT held, that as the declaration is penned, the action is maintainable; for every one ought *sic uti suo, quod alienum non laedat;* then when the plaintiff is an innkeeper, the defendant erecting a tallow-furnace annoyed his house with stenches, especially by boiling stinking stuff; and so in *Tohayle's Case*, who erected a tallow-furnace across the street of Denmark-house in the Strand, it was found a nuisance upon the indictment, and adjudged to be removed. Whereupon judgment was here given for the plaintiff.

ROBERTS v. HARRISON

SUPREME COURT OF GEORGIA. 1897.

[101 *Georgia Reports* 773.]

SIMMONS, C. J. A petition was filed by Roberts and five others under section 4760 of the Civil Code, for the removal of a pond of water which had collected upon the lands of W. O. Harrison. The jury returned a verdict finding the pond a nuisance, and the justices of the peace directed the sheriff or

his deputy to enter upon the lands "and abate the nuisance complained of, by removing said pond in the most feasible manner." The defendant carried the case by certiorari to the superior court. There the certiorari was sustained and the judgment of the justices set aside, on the ground that while, in a sense, the pond complained of is a nuisance, it is not such a *legal nuisance* as the justices of the peace have jurisdiction to abate.

The area of the pond in question varied from time to time, and the water, partially receding, would leave exposed to the sun portions of land which had been submerged. In the processes of evaporation and by the decay of large masses of vegetable matter, noxious and deleterious gases were emitted which were injurious to the public health and to the health of persons residing in the community. The accumulation of the water was due solely to natural causes, and the defendant did not, by his own act or negligence, contribute to bring about the alleged nuisance. At one time the land had been drained by a ditch which emptied into a creek, but in consequence of the filling in and choking up of either the ditch or the creek, or both, the water accumulated and formed the pond. The defendant had done nothing to interfere with the natural drainage, and the pond was formed by the overflow of the creek due entirely to causes over which the defendant had no control.

The presence of the pond and the attendant evils were doubtless annoying and even injurious to persons residing in the neighborhood, but we think that they do not constitute a nuisance for which the defendant can be held answerable or which he can be compelled, under section 4760 of the Civil Code, to abate. This court has held that a person is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failures of duty. *Brimberry v. S., F. & W. Ry. Co.*, 78 Ga. 641, and the cases there cited and discussed. This doctrine, we think, is the true one, and it is recognized as such by all the authorities on this point which we have examined. In 1 Wood on Nuisances, Sec. 116, we find the rule thus stated: "Where water collects in low, marshy places, and, by reason of becoming stagnant, emits gases that are destructive to the health, the lives even, of the community, this is not a nuisance in a legal sense; and the owner of the land is not bound to drain it, nor can he be subjected to action or indictment therefor. The reason is, that in order to create a *legal* nuisance, *the act of man* must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose

premises the cause exists could remove it with little trouble and expense. . . . Thus it will be seen that a nuisance cannot arise from the neglect of one to remove that which exists or arises from purely natural causes." See also *Giles v. Aratkir, (Giles v. Walker)* 24 Q. B. Div. 656; *Mohr v. Gault,* 10 Wis. 513, s. c. 78 Am. Dec. 687; *Hartwell v. Armstrong,* 19 Barb. (N. Y. Sup. Ct.) 166; *State v. Rankin,* 3 S. C. 438, s. c. 16 Am. Rep. 737; *Peck v. Herrington,* 109 Ill. 611, s. c. 50 Am. Rep. 637; *Woodruff v. Fisher,* 17 Barb. 224.

The facts in the present case place it within the principles announced in the cases above cited, and the judgment of the justices of the peace was erroneous. The certiorari of the defendant was properly sustained and the judgment of the justices set aside.

*Judgment affirmed. All the justices concurring.**

ROGERS v. ELLIOTT.

SUPREME COURT OF MASSACHUSETTS. 1888.

[146 *Massachusetts Reports* 349.]

Tort for a nuisance, namely, the ringing of a church-bell. At the trial in the Superior Court, before Staples, J., there was evidence tending to prove that the plaintiff, who lived with his father in a thickly settled portion of Provincetown, had received a sunstroke, and was carried home and a physician called to attend him; that directly opposite his father's house across a street but twenty feet in width was a Roman Catholic Church, of which the defendant was the clergyman in charge; that one of the incidents of the plaintiff's illness was that loud noises might throw him into convulsions; that the defendant was informed by the physician and the plaintiff's father of the probable consequences to the plaintiff of the ringing of the bell upon his church, and was requested not to ring it; that the defendant refused to refrain from ringing the bell, but caused it to be rung eight times upon the next Sunday, as usual, twice before each of the four services held upon that day; that the plaintiff, the windows of whose room were shut, was thrown into violent and painful convulsions at each time that the bell on the church was rung, as well as when other bells in the town were rung, or a whistle on a steamboat in the harbor was blown, and once when the town clock struck; and that the convulsions increased the illness and retarded the recovery of the plaintiff.

The judge ruled that the plaintiff was not entitled to re-

* *Accord*: *Giles v. Walker* (1890) L. R. 24 Q. B. D. 656; *Railway v. Spinks* (1896) 13 Texas Civil Appeals 542.—*Ed.*

cover, and ordered a verdict for the defendant; and reported the case for the determination of this court. If the ruling was wrong, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered on the verdict.

H. M. Knowlton, for the plaintiff, stated in his brief, that "the plaintiff does not rely upon any evidence of express malice on the part of the defendant. But he claims that, under all the circumstances of the case, the law would imply malice on his part."

J. J. McDonough, for the defendant.

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic Church used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street in a thickly settled part of the town, and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. *Wesson v. Washburn Iron Co.,* 13 Allen, 95.

In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. In densely populated communities the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the

effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering; nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house,—not how it will affect a particular person, who happens to be there to-day, or who may chance to come to-morrow. *Fay v. Whitman,* 100 Mass. 76. *Davis v. Sawyer,* 133 Mass. 289. *Walter v. Selfe,* 44 DeG. & Sm. 315, 323. *Soltau v. De Held,* 2 Sim. (N. S.) 133. *St. Helen's Smelting Co. v. Tipping,* 11 H. L. Cas. 642.

In *Walter v. Selfe,* Vice-Chancellor Knight Bruce, after elaborating his statement of the rule, concludes as follows: "They have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age, or whatever their state of health."

It is said by Lord Romilly, Master of the Rolls, in *Crump v. Lambert,* L. R. 3 Eq. 409, that "The real question in all the cases is the question of fact, viz. whether the annoyance is such as materially to interfere with the ordinary comfort of human existence."

In the opinion in *Sparhawk v. Union Passenger Railway,* 54 Penn. St. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injury from alleged nuisances, viz. such as naturally and necessarily result to all alike who come within their influence."

In the case of *Westcott v. Middleton,* 16 Stew. (N. J.) 478, it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible and other work was going on, which af-

fected the tender sensibilities of the plaintiff, and caused him great discomfort. Vice-Chancellor Bird, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor, because he is so morally or mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining. . . . A wide range has indeed been given to courts of equity in dealing with these matters; but I can find no case where the court has extended aid unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike."

If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise and demand as of legal right that the bell should not be used.

The plaintiff, in his brief, concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far and under what circumstances malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.

DAVIS v. SAWYER

SUPREME COURT OF MASSACHUSETTS. 1882.

[133 *Massachusetts Reports* 289.]

W. ALLEN, J. This is a bill in equity praying for an injunction to restrain the defendants from ringing a bell. The case comes here on appeal by the defendants from a decree entered by a single judge, enjoining them from ringing the bell earlier than half after six o'clock in the morning. The plaintiffs for many years have owned and occupied dwelling-houses situated, one about one thousand feet, and the other about three thousand feet, from a woolen mill of the defendants. The defendants began to run their mill, which had been before that occupied by other persons, in December 1879, and about January 1, 1880, placed the bell upon the mill, and caused it to be rung every working day at five o'clock, and twice between six and six and one half o'clock, in the morning, and at other times during the day, except that the five-o'clock bell was discontinued during the summer months.

The plaintiffs allege that the bell as rung is a private nuisance to them, and injures their property, and disturbs the quiet and comfort of their homes; that it is not necessary for any purpose of trade or manufacture; that it is unnecessarily large, and rung at unseasonable hours, and unreasonably long. The defendants in their answer deny that the bell is a nuisance to the plaintiffs, and say that it is used by the defendants to summon the operatives in their mill to work; that it is necessary and customary to adopt some method to summon operatives in such a manufactory to their work; that the bell is of suitable size, and rung at suitable hours, and in a proper manner, for that purpose.

Two questions are presented: whether the plaintiffs have proved that the ringing of the bell is a nuisance to them; and whether it is such a nuisance that this court will interfere to restrain it by injunction.*

* The opinion of the court on the second question is omitted.—*Ed.*

Noise which constitutes an annoyance to a person of ordinary sensibility to sound, such as materially to interfere with the ordinary comfort of life, and impair the reasonable enjoyment of his habitation, is a nuisance to him. *Crump v. Lambert,* L. R. 3 Eq. 409. *Wesson v. Washburn Iron Co.,* 13 Allen 95. *Fay v. Whitman,* 100 Mass. 76. Upon a careful examination of the evidence reported, it seems fully to sustain the finding of the judge who heard the case, that the ringing of the bell was a nuisance to the plaintiffs. The bell weighs about two thousand pounds, and is set in an open tower about forty feet from the ground, and was rung for a long time at five o'clock, as many as ninety strokes having been repeatedly counted. The residences of the plaintiffs are so situated with respect to the bell, particularly that of the plaintiff Davis, being higher than the bell and upon a hillside, with no obstruction between, that they receive the full force of the sound, and they are in a village in which, at that hour, there is no other ringing of bells, or other disturbing noise. Without referring to the evidence in detail, or reviewing the particular circumstances affecting the question, it is enough to say that the evidence sustains what must have been found by the judge, namely, that the plaintiffs were deprived of sleep during hours usually devoted to repose, and were personally annoyed and disturbed in their homes, and the quiet and comfort of their dwellings were impaired, as the natural consequence of the acts of the defendants which are complained of. Nor is the fact that a large majority of the persons living nearer to the bell than the plaintiffs were not annoyed by it, at all conclusive that it would not, and did not, awaken and annoy persons of ordinary sensibility to noise situated as the plaintiffs were. Besides the consideration that nearness to the bell would not alone determine the effect produced by its sound, it is obvious that the bell was sufficient and effective to awaken persons ordinarily sensitive to sound, who were no more exposed to its effects than the plaintiffs were. That was the effect it was intended to produce, and, if it had not in fact produced the effect, its use would not have been continued. The fact that some persons may have had such associations connected with the sound that it may have been to them a pleasure rather than an annoyance, or that the sensibility of others to the sound may have become so deadened that it ceased to disturb them, shows that the noise was not a nuisance to them, but does not change its character as to others. Many persons can, by habit, lose, to some extent, their sensibility to a disturbing noise, as they can to a disagreeable taste or odor or sight, or their susceptibility to a particular poison, but it is because

they become less than ordinarily susceptible to the particular impression. In this case, the evidence shows that persons were awakened and disturbed by the bell until they had lost ordinary sensibility to its sound. . . .

Decree affirmed.

BAMFORD v. TURNLEY

COURT OF QUEEN'S BENCH. 1860.

[3 *Best and Smith's Reports* 60.]

COURT OF EXCHEQUER CHAMBER. 1862.

[3 *Best and Smith's Reports* 66.]

The first count of the declaration stated that the plaintiff was possessed of a messuage and dwelling-house and premises, with the appurtenances, situate at Norwood, in the county of Surrey, in which he dwelt with his family and servants; and that the defendant, contriving and intending to injure and annoy the plaintiff, erected and made certain brick-kilns upon certain land of the defendant adjoining and near to the messuage and dwelling-house and premises of the plaintiff, and wrongfully and injuriously burned a large quantity of bricks in the brick-kilns, and caused noxious and unwholesome vapors, smokes, fumes, stinks, and stenches to rise and proceed from the brick-kilns, and to enter in, spread and diffuse themselves over, upon, into, through and about the messuage and dwelling-house and premises of the plaintiff, and the air over, through, and about the same was thereby greatly impregnated and filled with the said noxious and unwholesome vapors, fumes, stinks, and stenches, and was rendered and became and was corrupted, offensive, unwholesome, unhealthy, and uncomfortable; and thereby the plaintiff had been greatly annoyed and inconvenienced in the possession and enjoyment of his messuage and dwelling-house, and also, by means of the corrupt, unwholesome, and unhealthy state of the air in and over and about the plaintiff's dwelling-house so occasioned, the plaintiff and his family and servants became and were sick and ill, and so continued for a long time, and the plaintiff had necessarily incurred a great expense in and about obtaining necessary medical advice, and was otherwise greatly injured and prejudiced.

The second count of the declaration complained of a similar nuisance by the defendant's placing a quantity of decomposed ashes and bones in the immediate neighborhood of the plaintiff's house.

The only material plea to both counts was Not guilty, upon which issue was joined.

On the trial, before COCKBURN, C. J., at the Summer Assizes at Guildford, 1860, it appeared that in the month of June, 1857, some land at Norwood, part of the Beulah Spa Estate, was offered for sale in lots by public auction, in accordance with certain printed particulars and conditions of sale. The particulars were headed "Particulars of the first section of the Beulah Spa Estate, consisting of about fifty acres of Freehold Building Land, &c., in nineteen lots," and stated, among other things, that the property presented "splendid sites for the erection of first-class villas"; and it was added, "There is abundance of brick earth and gravel, which, combined with all the other advantages appertaining to this exceedingly beautiful property, present an unusually advantageous opportunity of carrying out safe and profitable building operations." Captain Edward Strode, the brother-in-law of the plaintiff, in the year 1857 purchased lot 11 of this property, containing 2a. 1r. 33p., and built a residence thereon. The house was finished in the year 1858, and shortly afterwards the plaintiff became the tenant of the house and property. The defendant was a solicitor in London, and in the year 1858 he bought some other lots of the same property under the same particulars and conditions, being respectively lots 1, 10, 14, and 16. It was proved that building was going on in the neighborhood, the plaintiff's house being within ten minutes' walk of the new railway station at Norwood. It also appeared that, during the preceding year, bricks had been burned at certain spots in lots 13 and 15, and at a spot adjoining to lot 15. It further appeared, that during the last seventeen or eighteen years, bricks had from time to time been burned at various parts of the field, of which the site of the clamp in question then formed part, such field having been divided at the time of the sale into various lots. It also appeared that bricks had previously been made on the spot where the plaintiff's house stood.

In the month of June, 1860, the defendant, with the view of burning bricks made out of the brick earth found upon his land, and thereby obtaining bricks to build upon it, erected a clamp of bricks on lot 16, at a distance of 180 yards from the plaintiff's house. It was proved that there was an annoyance to the plaintiff arising from the erection and use of the clamp as complained of in the first count sufficient *prima facie* to constitute a cause of action; but it was also proved that the erection and use of the clamp by the defendant as complained of was temporary only, and for the sole purpose of making bricks on his own land and from the clay found there, with a view to the erection of dwelling-houses on his own land; and that the clamp

for burning the bricks was placed on that part of the defendant's land most distant from the plaintiff's house, and so as to create no further annoyance than necessarily resulted from the burning of bricks; and the question was whether, under the circumstances so proved, an action could be maintained in respect of such annoyance.

The Lord Chief Justice intimated that the case came within the principle laid down in *Hole v. Barlow,* [4 C. B. N. S. 334], and directed the jury, upon the authority of that case, that if they thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict upon the first count, independent of the small matter of whether there was an interference with the plaintiff's comfort thereby. Upon this ruling a verdict was by arrangement entered for the defendant on the first count, leave being reserved to the plaintiff to move to set it aside, if the court should be of the opinion that the above ruling of the Lord Chief Justice was erroneous.

Upon the second count, a verdict was by arrangement entered for the plaintiff, with 1 *s.* damages, but no question arose on that count.

In the following Michaelmas term,

Petersdorff, Serjt., moved for a rule calling upon the defendant to show cause why a verdict should not be entered for the plaintiff on the first count for 40 *s.* damages.

Per Curiam. (COCKBURN, C. J., WIGHTMAN, HILL, and BLACKBURN, JJ.)

Rule refused, with leave to appeal.

The plaintiff having appealed against the above decision, a case setting forth the facts was stated, and concluded as follows:—

"If the court should be of opinion that, upon the facts as stated, the ruling of the Lord Chief Justice, founded upon the decision of *Hole v. Barlow,* was erroneous, the verdict found for the defendant on the first count is to be set aside, and a verdict entered for the plaintiff instead thereof with 40 *s.* damages.

"If the court should be of a contrary opinion, the verdict entered for the defendant upon the first count is to stand."

The case was argued in Easter vacation, May 14th, before ERLE, C. J., POLLOCK, C. B., WILLIAMS and KEATING, JJ., and BRAMWELL and WILDE, BB.

* *Mellish* (with him *Petersdorff*, Serjt., and *Garth*), for the plaintiff.

Lush (with him *Honyman*), for the defendant.

Cur. adv. vult.

WILLIAMS, J., delivered the judgment of ERLE, C. J., KEATING, J., WILDE, B., and himself. On the argument of this case, there was some contest as to what the true question was which the court had to consider. On the part of the plaintiff it was said to have been proved at the trial, beyond dispute, that the burning of the bricks in the kilns of the defendant was a nuisance, and that the point reserved was, whether it was legalized by the other facts which the jury must be taken to have found to exist. On the part of the defendant it was said that the true point was, whether under all the circumstances of the case, the burning of the bricks amounted to an actionable nuisance.

It is not, perhaps, material, which of these contentions is correct. For the Lord Chief Justice, at the trial, directed the jury, on the authority of *Hole v. Barlow*, [4 C. B. N. S. 334], to find for the defendant, notwithstanding his burning the bricks had interfered with the plaintiff's comfort, if they were of opinion that the spot where the bricks were burned was a proper and convenient spot, and the burning of them was, under the circumstances a reasonable use by the defendant of his own land. The jury, consequently, if they were of that opinion, would have been bound to find their verdict for the defendant, notwithstanding they were also of opinion that the brick-kilns of the defendant, by immitting corrupted air upon the plaintiff's house, had rendered it unfit for healthy or comfortable occupation.

It was therefore treated as a doctrine of law that, if the spot should be found by the jury to be proper or convenient, and the burning of the bricks a reasonable use of the land, these circumstances would constitute a bar to the action; and if there is, in truth, no such doctrine, there was a misdirection:—it is the same thing as if there had been a plea averring the existence of these circumstances, and a demurrer to the plea. Such a plea, though it would admit all the allegations in the declaration, would be a good plea by way of avoidance, if the direction of the Chief Justice was right. And it is not material to inquire whether it would be good as averring facts which amount to a legalization of the nuisance stated in the declaration, or as superadding facts which taken together with those stated in the

* The arguments of counsel are omitted.—*Ed.*

declaration, show that the alleged annoyance was not an actionable nuisance. In either point of view the question for our consideration appears to be, whether the case of *Hole v. Barlow,* [4 C. B. N. S. 334], was well decided. And we are of opinion that it was not.

That decision was plainly founded on a passage in Comyns' Digest, Action upon the Case for a Nuisance (C), which is in the following words: "So an action does not lie for a reasonable use of my right, though it be to the annoyance of another; as, if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbor." It may be observed that in the language of this *dictum* (for which no authority is cited by Comyns), there is a want of precision, especially in the words "reasonable" and "convenient," which renders its meaning by no means clear. And it may be doubted whether the court, in *Hole v. Barlow,* [4 C. B. N. S. 334], did not misunderstand it. What is a "convenient place"? Does this expression mean, as the court understood it in that case, that the place is proper and convenient for the purpose of carrying on the trade, or does it mean that it is a place where a nuisance will not be caused to another? It has been pointed out by Mr. W. H. Willes, in his valuable edition of Gale on Easements, p. 410, note, that this latter sense of the word "convenient" is the one adopted by Hide, C. J., in *Jones v. Powell,* Palm, 536, 539; s. c. Hutt, 135, where he says, "A tan-house is necessary, for all men wear shoes, and nevertheless it may be pulled down if it be erected to the nuisance of another; in like manner of a glass-house; and they ought to be erected in places convenient for them." In the original Norman-French it is "Un tan house est necessary, car touts wear shoes; et uncore ceo poit estre pull down, &c., si est erect al nusance d'auter: et issint de glass house; Et pur ceux doient estre erect in places convenient pur eux." The term appears to be used in the same sense when applied to questions as to public nuisances. Thus it is said in Hawkins, P. C., book 1, c. 75 (2 Hawk, P. C., by Leach, p. 146, s. 10), "It seems to be agreed, that a brew-house, erected in such an inconvenient place wherein the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance." It should seem therefore, that just as the use of an offensive trade will be indictable as a public nuisance if it be carried on in an inconvenient place, *i. e.,* a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an inconvenient place, *i. e.,* a place where it greatly incommodes an individual.

If this be the true construction of the expression "convenient" in the passage from Comyns' Digest, the doctrine contained in it amounts to no more than what has long been settled law, viz., that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher or brewer and the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighboring house.

In *Hole v. Barlow* [4 C. B. N. S. 334], however, the court appear to have read the passage as containing a doctrine that a place may be "proper and convenient" for the carrying on of a trade, notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbor. This is a doctrine which has certainly never been judicially adopted in any case before that of *Hole v. Barlow,* and moreover the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar during the argument, and more especially with the case of *Walter v. Selfe* [4 De Gex & Sm. 315]. And the introduction of such a doctrine into our law would, we think, lead to great inconvenience and hardship, because, as was forcibly urged by Mr. Mellish, in arguing for the plaintiff, if the doctrine is to be maintained at all, it must be maintained to the extent that, however ruinous may be the amount of nuisance caused to a neighbor's property by carrying on an offensive trade, he is without redress if a jury shall deem it right to find that the place where the trade is carried on is a proper and convenient place for the purpose.

It should be observed that the direction of the judge to the jury in *Hole v. Barlow* [4 C. B. N. S. 334], which was upheld by the Court of Common Pleas, was simply that the verdict ought to be for the defendant if the place where the bricks were burned was a convenient and proper place for the purpose. But in the present case, the Lord Chief Justice's direction to the jury pointed at a further condition, viz., if the burning of the bricks was under the circumstances a reasonable use by the defendant of his own land. It remains, therefore, to consider whether the doctrine adopted in *Hole v. Barlow,* if accompanied with this addition, is maintainable.

If it be good law, that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land. But if it is not good law, and if the true doctrine is, that whenever, taking all the circumstances into con-

sideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be, then surely the jury cannot properly be asked whether the causing of the nuisance was a reasonable use of the land.

If such a question is proper for their consideration in an action such as the present, for a nuisance by immitting corrupted air into the plaintiff's house, we can see no reason why a similar question should not be submitted to the jury in actions for other violations of the ordinary rights of property, *e. g.*, the transmission by a neighbor of water in a polluted condition. But certainly it would be difficult to maintain, as the law now stands, that the jury, in such an action, ought to be told to find for the defendant if they thought that the manufactory which caused the impurity of the water was built on a proper and convenient spot, and that the working of it was a reasonable use by the defendant of his own land. Again, where an easement has been gained in addition to the ordinary rights of property, *e. g.*, where a right has been gained to the lateral passage of light and air, no one has ever suggested that the jury might be told, in an action for obstructing the free passage of the light and air, to find for the defendant if they were of opinion that the building which caused the obstruction was erected in a proper and convenient place, and in the reasonable enjoyment by the defendant of his own land. And yet, on principle, it is difficult to see why such a question should not be left to the jury if *Hole v. Barlow* was well decided.

We are, however, of opinion that the decision in that case was wrong, and, consequently, that the direction of the Lord Chief Justice, which was founded on it, was erroneous, that the verdict for the defendant ought to be set aside, and a verdict entered for the plaintiff.

POLLOCK, C. B. The question in this case is, whether the direction of the Lord Chief Justice, professing to be founded on the decision of the Court of Common Pleas in *Hole v. Barlow* [4 C. B. N. S. 334,] was right, and in my judgment substantially it was right, viz., taking it to have been as stated in the case, viz., "that if the jury thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict." I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on

the surrounding circumstances,—the place where, the time when, the alleged nuisance, what, the mode of committing it, how, and the duration of it, whether temporary or permanent, occasional or continual,—as to make it impossible to lay down any rule of law applicable to every case, and which will also be useful in assisting a jury to come to a satisfactory conclusion:—it must at all times be a question of fact with reference to all the circumstances of the case.

Most certainly in my judgment it cannot be laid down as a legal proposition or doctrine, that anything which, under any circumstances, lessens the comfort or endangers the health or safety of a neighbor, must necessarily be an actionable nuisance. That may be a nuisance in Grosvenor Square, which would be none in Smithfield Market; that may be a nuisance at midday which would not be so at midnight; that may be a nuisance which is permanent and continual, which would be no nuisance if temporary or occasional only. A clock striking the hour, or a bell ringing for some domestic purpose, may be a nuisance, if unreasonably loud and discordant, of which the jury alone must judge; but although not unreasonably loud, if the owner, from some whim or caprice, made the clock strike the hour every ten minutes, or the bell ring continually, I think a jury would be justified in considering it to be a very great nuisance. In general, a kitchen chimney, suitable to the establishment to which it belonged, could not be deemed a nuisance: but if built in an inconvenient place or manner, on purpose to annoy the neighbors, it might, I think, very properly be treated as one. The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some enjoyment abridged, to provide for the more general convenience or necessities of the whole community; and I think the more the details of the question are examined, the more clearly it will appear that all that the law can do is to lay down some general and vague proposition which will be no guide to the jury in each particular case that may come before them.

I am of opinion that the passage in Comyns' Digest, Action upon the Case for a Nuisance (C), is good law. I think the word "reasonable" cannot be an improper word, and too vague to be used on this occasion, seeing that the question whether a contract has been reasonably performed with reference to time, place, and subject-matter, is one that is put to a jury almost as often as a jury is assembled. If the act complained of be done in a convenient manner, so as to give no unnecessary annoyance,

and be a reasonable exercise of some apparent right, or a reasonable use of the land, house, or property of the party under all the circumstances, in which I include the degree of inconvenience it will produce, then I think no action can be sustained, if the jury find that it was reasonable,—as the jury must be taken to have found that it was reasonable that the defendant should be allowed to do what he did, and reasonable that the plaintiff should submit to the inconvenience occasioned by what was done. And this gets rid of the difficulty suggested in the judgment read by my Brother Williams; because it cannot be supposed that a jury would find that to be a reasonable act by a person which produces any ruinous effect upon his neighbors.

With respect to the proposed judgment of the court, as the case does not state that leave was given by the consent of the defendant's counsel, or indeed at all, to enter a verdict for the plaintiff for 40 *s.* damages, it appears to me that all that this court of error can do, if it disapproves of the direction of the Lord Chief Justice, is to award a *venire de novo,* that the jury may find a verdict under a proper direction; for there is strong ground for contending that the entire plot of ground of which the plaintiff's and the defendant's land formed a part, was sold in various lots, on the understanding that the brick earth should be made into bricks and burned, in order to erect houses on the defendant's lots, and it would seem not perfectly just that the purchaser of one of the lots should actually turn his brick earth into bricks, and build a house, and then deny the same advantage to his neighbors. I think therefore that, if my learned brothers are right in denying to the jury the power of finding that any act was an act reasonable to be done, still, on the statement of the present case, the court has not power to enter a verdict for the plaintiff for 40 *s.*

But in my opinion the judgment of the court below ought to be affirmed.

MARTIN, B., read the judgment of

BRAMWELL, B. I am of opinion that this judgment should be reversed. The defendant has done that which, if done wantonly or maliciously, would be actionable, as being a nuisance to the plaintiff's habitation by causing a sensible diminution of the comfortable enjoyment of it. This, therefore, calls on the defendant to justify or excuse what he has done. And his justification is this: He says that the nuisance is not to the health of the inhabitants of the plaintiff's house, that it is of a temporary character, and is necessary for the beneficial use of his, the defendant's land, and that the public good requires he should be entitled to do what he claims to do.

The question seems to me to be, Is this a justification in law, —and, in order not to make a verbal mistake, I will say,—a justification for what is done, or a matter which makes what is done no nuisance? It is to be borne in mind, however, that, in *fact,* the act of the defendant is a nuisance such that it would be actionable if done wantonly or maliciously. The plaintiff, then, has a *prima facie* case. The defendant has infringed the maxim *Sic utere tuo ut alienum non laedas.* Then, what principle or rule of law can he rely on to defend himself? It is clear to my mind that there is some exception to the general application of the maxim mentioned. The instances put during the argument, of burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, neverthless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are; and it cannot be doubted that, if a person maliciously and without cause made close to a dwelling-house the same offensive smells as may be made in emptying a cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is. For that is to suppose they violate their duty, and that, if they discharged their duty, such matters would be actionable, which I think they could not and ought not to be. There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbor's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.

Then can this principle be extended to, or is there any other principle which will comprehend, the present case? I know of

none: it is for the defendant to show it. None of the above reasoning is applicable to such a cause of nuisance as the present. It had occurred to me, that any not unnatural use of the land, if of a temporary character, might be justified; but I cannot see why its being of a temporary nature should warrant it. What is temporary,—one, five, or twenty years? If twenty, it would be difficult to say that a brick kiln in the direction of the prevalent wind for twenty years would not be as objectionable as a permanent one in the opposite direction. If temporary in order to build a house on the land, why not temporary in order to exhaust the brick earth? I cannot think then that the nuisance being temporary makes a difference.

But it is said that, temporary or permanent, it is lawful because it is for the public benefit. Now, in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case,—whenever a thing is for the public benefit, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that trains should run, but not unless they pay their expenses. If one of those expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit they should if the wood is not their own. If though the wood were their own, they still would find it *compensated them* to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains. So in like way in this case a money value indeed cannot easily be put on the plaintiff's loss, but it is equal to some number of pounds or pence, 10 *l.*, 50 *l.*, or what not: unless the defendant's profits are enough to compensate this, I deny that it is for the public benefit

he should do what he has done; if they are, he ought to compensate.

The only objection I can see to this reasoning, is that by injunction or by abatement of the nuisance a man who would not accept a pecuniary compensation might put a stop to works of great value, and much more than enough to compensate him. This objection, however, is comparatively of small practical importance; it may be that the law ought to be amended, and some means be provided to legalize such cases, as I believe is the case in some foreign countries on giving compensation; but I am clearly of opinion that, though the present law may be defective, it would be much worse, and be unjust and inexpedient, if it permitted such power of inflicting loss and damage to individuals, without compensation, as is claimed by the argument for the defendant.

Since the decision of *Hole v. Barlow,* [4 C. B. N. S. 334], claims have been made to poison and foul rivers, and to burn up and devastate land, on the ground of public benefit. I am aware that case did not decide so much, but I have a difficulty, for the reasons I have mentioned, in saying that what has been so contended for does not follow from the principles enunciated in that case.

If we look to analogous cases I find nothing to countenance the defendant's contentions. A riparian owner cannot take water for the public benefit; he cannot foul it for the public benefit, if to the prejudice of another owner. A common cannot be enclosed on such principle. A window, the fee-simple of which is 5 *s.*, cannot be stopped up by a building worth 1,000,000 *l.*, of the greatest public benefit, nor a way. The windows of such a house might be blocked from light and air, however contrary that might be to the public benefit.

It is true that a man's character may be unjustly attacked in some cases without remedy. But we ought to follow the rule, not the exception; and that that is an exception and anomalous cannot be doubted. It is shown by such instances as I have put, and by this:—if a man sees another apparently committing a felony, he is bound by law to prevent it if the man is really committing it; but if it turns out that no felony is being committed, the arrest of such a man would be an assault and false imprisonment.

As to the somewhat remote illustration of taking a man's land in case of foreign invasion, it is said that is a case of "necessity"; but it can hardly be a "necessity" to burn bricks on the defendant's land, to the nuisance of the plaintiff, without compensation.

I confess then I can see no reason or principle in the defendant's contention.

With the greatest respect for those who decided *Hole v. Barlow,* I cannot, for the reasons I have given, agree with it. That case reminds me strongly of what the late Lord Denman said, that he suspected a case very much when he found it continually quoted immediately after its decision; and certainly *Hole v. Barlow* has been so quoted, and defenses made on its authority which never would have been thought of before it appeared. It stands alone. It is practically opposed to cases of daily occurrence, where such a point might have been made and was not. I have a difficulty in putting a meaning on the words "convenient, reasonable, and proper," as there used. "Convenient, reasonable, and proper," as regards the defendant? That cannot be, as that might place the nuisance close to the plaintiff, to the entire loss of the power of dwelling in his house. "Convenient, reasonable, and proper," as between the two? Then the nuisance may lawfully be greater, as the defendant's premises are smaller, and so his kiln *must* be nearer. "Convenient, reasonable, and proper" as regards the public good? That I have already dealt with. These words are perfectly intelligible when applied to such nuisances as would form the common and ordinary use of land &c. See the comments on the case by Mr. W. H. Willes, in his edition of Gale on Easements, p. 409, note. It is countenanced by the passage from Comyns' Digest, tit. Action upon the Case for a Nuisance (C) alone, which is contradicted in the same book and is sufficiently dealt with by the judgment of my Brother Williams.

In the result, then, I think it should be overruled,—which practically is the question here,—and that our judgment should be for the plaintiff.

Judgment reversed, and entered for the plaintiff for 40s.

FALLOON v. SCHILLING

SUPREME COURT OF KANSAS. 1883.

[29 *Kansas Reports* 292.]

The opinion of the court was delivered by

BREWER, J. This was an action of injunction brought by plaintiff in error, plaintiff below, in the district court of Brown county. On the trial of the case, after the plaintiff had finished his evidence, a demurrer thereto was sustained, and judgment entered for the defendant. The facts as stated in the petition are, that defendant was the owner of a tract of eighty acres adjoining the town of Hiawatha. Out of this tract he conveyed

three-fourths of an acre to one Oscar Spalsbury, which last-named tract by sundry conveyances passed to and became the property of plaintiff. It was his homestead. His family consisted of himself, wife, and two boys aged respectively six and one years. Plaintiff's dwelling house is located within thirteen feet of the east line of his lot, and has three windows opening on that side. The town of Hiawatha has been growing rapidly for the last few years, and there is quite a demand for town lots. The eighty-acre tract, which as alleged was once wholly owned by defendant, is eligibly situated for the purposes of an addition to the town of Hiawatha, and defendant was anxious to lay off the entire eighty acres as such an addition. He offered plaintiff $1,600 for his property, which was refused, the same being reasonably worth $1,900 or $2,000. Thereupon defendant conceived the oppressive and unlawful idea of rendering plaintiff's home obnoxious and unendurable to himself and family, by erecting cheap tenement houses on either side of plaintiff's land, and filling them with worthless negroes that they might annoy plaintiff's wife, who is a person of delicate health, and thereby punish plaintiff for refusing defendant's inadequate offer for the property. In pursuance of this purpose, defendant started to build one of these tenement houses directly on the line of the plaintiff's land and thus distant only thirteen feet from plaintiff's house. Upon these facts the petition prays for an injunction restraining the defendant from erecting such buildings. Defendant answered this petition by general and special denials. The case was called for trial, and from the plaintiff's testimony the ownership of the land appeared as alleged; also, the occupation of plaintiff's land by himself as a homestead, the efforts of defendant to purchase plaintiff's property, defendant's expressed intention of erecting small houses close to plaintiff's land and renting them to negroes to annoy plaintiff's family, and enforce him to accept the offer, and also defendant's statement that he would make plaintiff sorry for refusing the offer, and that when he had forced plaintiff out of his homestead, he would move away the buildings. In pursuance of this intention, he erected a small building about twenty feet by twelve feet, placing it within four feet of plaintiff's land. It was without cellar or foundation walls, and so constructed that it could be removed without injury. It was a house of two rooms, was painted, and of itself looked neat, and would rent for some five or six dollars a month. When completed, it was rented to a colored preacher, who occupied it with his family, consisting of himself, wife, and one child. This family behaved well. Such was the substance of the testimony. Plaintiff's com-

plaint was, that defendant built this house close to his home and put this family into it for the purpose of annoying plaintiff, and not for the purpose of improving his own property. We have stated the allegations of the petition and the substance of plaintiff's testimony at length, in order that the full ground of plaintiff's complaint may be perceived. Stated briefly it is, that defendant, the owner of adjacent land, provoked at plaintiff because of his refusal to sell at his terms, and for the sake of annoying plaintiff and his family, erected small tenement houses close to plaintiff's land, and rented them to negroes. Do these facts entitle him to an injunction? Plaintiff invokes the familiar maxim, *"Sic utere tuo ut alienum non laedas,"* and insists that under that he is entitled to the injunction prayed for. It will be perceived that plaintiff's complaint is two-fold: first, as to the kind of buildings that defendant is erecting; and second, the uses to which he intends putting them. He complains that defendant is erecting small shanties, and that he proposes filling them with worthless negroes. His testimony fails to fully sustain his allegations. It is true the building defendant has erected is a small tenement house of but two rooms, without cellar or foundation walls, and yet the plaintiff himself says the building looks neat. The building is rented to a negro family, but that family is the family of a preacher, and well behaved. It cannot therefore be said that defendant is filling his buildings with *worthless* negroes. Now does the fact that defendant is improving his property with small tenement houses—houses which do not compare favorably with plaintiff's homestead—and that he is renting those houses to negro families, give plaintiff a right to interfere by an injunction simply on the ground that defendant is so acting for the purpose of annoying plaintiff? We think not. Doubtless a party may obtain an injunction to restrain a neighbor from erecting or continuing on his premises a nuisance, but that as a general rule is the limit of interference. A man has a right to improve his property in any way he sees fit, providing the improvement is not such a one as the law will pronounce a nuisance, and this he may do although he make such improvement through spite. And it may be laid down as a universal rule, that the size and quality of the improvement never of themselves constitute it a nuisance. A landowner may erect upon his land the smallest or most temporary kind of dwelling-house or store in close proximity to the finest mansion or block of buildings, and that for the mere sake of spiting the owner of such mansion or block of buildings by the contrast, without becoming subject to restraint at the hands of the courts. In other words, if the improvement itself is legiti-

mate and lawful, is not, *per se,* a nuisance, the law will not inquire into the motives with which he acts. It is true the law will interfere to prevent the erection of a nuisance such as a stable, out-building, etc., but not to prevent the erection of a store, tenement, or anything of that nature. Even where the building may or may not become a nuisance, according to the manner in which it is used, the erection of the building will not be restrained. High, in his work on Injunctions, § 488, says:

"Where the injury complained of is not, *per se,* a nuisance, but may or may not become so, according to circumstances, and where it is uncertain, indefinite or contingent, or productive of only possible injury, equity will not interfere. Thus, the erection of a wharf, a railroad bridge, a planing mill, a livery stable, or a turpentine distillery, will not be enjoined where the injury is only a possible and contingent one."

And in support thereof cites several authorities. Again, in § 496, the author states:

"It is no ground for interference that the erection of the alleged nuisance would prevent the use of surrounding property for such buildings as, in the ordinary course of affairs and the extension of a city, would be erected, nor that it would increase the rate of insurance on surrounding buildings."

Of course, these tenement houses, though small, would when rented bring income to the defendant, and although he might have means to erect larger buildings and thus obtain a higher income, the size of the buildings is a matter for his judgment alone to determine. Again, even after buildings which are in themselves perfectly legitimate and proper are erected, they may be put to uses which are illegitimate and improper, which will constitute them nuisances and justify the interference of a court of equity. Thus if dwelling-houses are used as houses of ill-fame, a court of equity will restrain such use. But the interference will be only to enjoin the use and not to destroy the buildings. But equity will not interfere simply because the occupants of such houses are by reason of race, color, or habits disagreeable or offensive. A negro family is not, *per se,* a nuisance, and a white man cannot prevent his neighbor from renting his home to a negro family any more than he can to a German, or Irish, or French family. The law makes no distinction on account of race or color, and recognizes no prejudices arising therefrom. As long as that neighbor's family is well-behaved, it matters not what the color, race, or habits may be, or how offensive personally or socially it may be to plaintiff; plaintiff has no cause of complaint in the courts. We think, therefore, that neither the size nor character of the building erected, nor

the use to which it is put, justifies any interference on the part of the courts. The defendant used this property for his own benefit in a legitimate way, created no nuisance, and, though he may have acted with the utmost spite against the plaintiff, yet so long as he keeps within the limits of legal action, the courts will not interfere. We have examined the various cases cited by plaintiff, and see none directly in point, or that will sustain his cause of action. The case of *Harbison v. White,* 46 Conn. 106, was decided under a local statute attempting certain police regulations. But even that does not conflict with this decision. The other cases are cases in which the acts enjoined were of themselves nuisances. We find no case in which a party seeking to place an improvement upon his own land, an improvement which will increase his income, which improvement is not a nuisance, which does not endanger the physical health or comfort of his neighbor, is restrained from such improvement on the ground that it is annoying and disagreeable to such neighbor, that it does not correspond in character and kind with the improvements on such neighbor's premises, that it would bring a different class of people socially into immediate proximity to his neighbor, and that all this was done and intended through spite against such neighbor. We think, therefore, the judgment of the district court was right, and that it must be affirmed; and it is so ordered. All the justices concurring.*

LETTS v. KESSLER.

SUPREME COURT OF OHIO. 1896.

[54 *Ohio State Reports* 73.]

The plaintiff below, defendant in error here, filed her petition in the court of common pleas against defendant below, plaintiff in error here, averring that she was the owner by purchase

* In *Lane v. Concord* (1900) 70 New Hampshire 485, it appeared that defendant permitted other persons to dump upon his lot refuse of various kinds including "sand, gravel, brush, leaves, grass, coal ashes, tin cans, stove pipe, broken earthen and glass ware, rags, old boots and shoes, hoop-skirts, paper, old mattresses, etc." No animal or vegetable matter other than "brush, leaves, grass, rags and old leather" was dumped on the lot. In an action on the case for nuisance the court instructed the jury, *inter alia,* as follows: " . . . that the unsightly appearance of the lot was not a cause for which the plaintiff was entitled to damages; that if she was not injured by something coming from the premises upon her land—gases or something else—she had no right to complain." On appeal this instruction was approved.

Compare, *Westcott v. Middleton* (1887) 43 N. J. Eq. 478; *Barnes v. Hathorne* (1886) 54 Maine 124; *Densmore v. Evergreen Camp W. O. W.* (1910) 61 Wash. 230.—*Ed.*

under a land contract of certain premises in the city of Cleveland, that defendant owned and occupied the lot on the east side thereof, that she used her premises as a hotel and boarding house, that he was erecting a high board fence on his ground which would obstruct her windows and deprive her of light and air, that said fence was not being erected for any useful or ornamental purpose, but from motives of pure malice alone, and for the express malicious purpose of annoying plaintiff, and excluding light and air from her house so as to render her house uninhabitable, to injure the value thereof, and that said fence would exclude the light and air and thereby greatly injure the value of her house. She prayed that he might be restrained from completing said fence, and that upon the final hearing a mandatory injunction might compel its removal.

Defendant below demurred to this petition, and the demurrer was overruled and exceptions taken. The ruling upon this demurrer is reported in 7 Circuit Court Rep. 108.

He then filed an answer in substance a general denial, with an averment that the fence was erected to prevent the rush of water and eave drip from her premises onto his. This she denied in her reply. The case went to the circuit court on appeal, and that court overruled the demurrer, and on the trial made a finding of facts containing in substance the allegations of the petition. The following is the finding of facts and the judgment:

"This cause came on to be heard upon the petition of the plaintiff, the answer of defendant, the reply of the plaintiff thereto, and the testimony, and the court being requested by the defendant to make a finding of facts in the case find the conclusions of fact as follows: That the plaintiff owns and occupies premises, situated on Lake street, in the city of Cleveland, known as "The Osborn," and said plaintiff owned and occupied said premises at the time of the erection of the structure hereinafter described. Said premises were used by plaintiff as a boarding house. Defendant owns and occupies premises adjoining plaintiff on the east. Between the two houses is a driveway and open space about twenty feet wide. Plaintiff and defendant had litigation in May, 1891, on account of defendant's having attached a shed roof to her building without consent of said plaintiff. About two weeks after the trial of said lawsuit, the defendant took down said shed roof, and built up against the house of said plaintiff a tight board fence. The said fence was eighty-six feet long. The scantlings were placed against the wall of said plaintiff's house and reached up under the eaves of the same. Boards were nailed onto the said scantlings, beginning about two feet from the ground and extending to the sills

of the second story windows. Defendant nailed onto the rear portion of said fence and extending about forty feet toward the front, a shed roof. Under this shed roof defendant had lumber piled. Said board fence completely covered up the bath room, kitchen, bed room and library windows, rendering said portion of the house dark, damp and uninhabitable, and causing substantial damage to the same. Said structure was erected upon the land of the defendant and belonged to him. The structure was erected by said defendant from motives of unmixed malice toward said plaintiff and for no useful or ornamental purposes of the property of said defendant, except said shed roof and its back wall below the shed roof, which may subserve some useful purpose of defendant, in the use of his property by protecting his lumber pile thereunder. The court, upon the foregoing facts, finds and decrees that said defendant be and is hereby enjoined from proceeding further with the erection of said fence. Adjudged and decreed that said defendant, within twenty days from the entering of this decree, take down all of said fence and scantling projecting above the roof of said shed, and all the remainder of said fence outside of and beyond said shed, and it is considered that the plaintiff recover her costs expended in the case, taxed at $....., and that the defendant pay his own costs, for which it is ordered that execution issue; to all of which the defendant excepts."

A motion for a new trial was made, overruled and exceptions taken. Thereupon a petition in error was filed in this court to reverse the judgment of the circuit court.

* *L. A. Willson* and *Edward David,* for plaintiff in error.

C. J. Estep and *S. S. Ford,* for defendant in error.

BURKET, J. The only question in this case arises upon the following findings of fact by the circuit court:—

"Said structure was erected upon the land of the defendant and belonged to him. The structure was erected by said defendant from motives of unmixed malice toward said plaintiff, and for no useful or ornamental purposes of the property of said defendant."

It is not claimed that the person of the plaintiff was interfered with in this case, so that we have for consideration only the rights of property.

The fence complained of is upon the land of the defendant and belongs to him. Plaintiff fails to aver, and the court fails to find, that she has any right to, or upon, the lot of the defendant below by contract, statute, or any other way known to the

* The arguments of counsel are omitted.—*Ed.*

law for acquiring a right to, in, or upon lands, unless such right may be acquired by, and transferred to her, by means of the aforesaid "motives of unmixed malice." This is a manner of acquiring on the one hand, and of transferring on the other, a right to property unknown to the law.

But it is urged in her behalf, that even if she had no right of property, and even if he was the owner of the lot, that he could not use his own land for the purpose of erecting structures thereon which subserve no useful or ornamental purpose, and are erected through motives of unmixed malice towards his adjoining neighbor.

It is and must be conceded that he might, by erecting a building on his lot, shut off her light and air to exactly the same extent as is done by this fence, and that in such case she would be without right and without remedy, even though done with the same feelings of malice as induced him to erect the fence; thus making his acts lawful when the malice is seasoned with profit, or some show of profit to himself, and unlawful when his malice is unmixed with profit, the injury or inconvenience to her, meanwhile, remaining the same in both cases. If through feelings of malice he desires to shut the light and air from her windows, it is nothing to her whether he makes a profit or loss thereby. Her injury is no greater and no less in the one case than in the other. As to her it is the effect of the act, and not the motive.

In effect he has the right to shut off the light and air from her windows by the building on his own premises, and she is not in effect concerned in the means by which such effect is produced, whether by a building or other structure; nor is she concerned as to the motive, nor as to whether he makes or loses by the operation. In the one case she might have a strong suspicion of his malice, while in the other such suspicion would be ripened into a certainty. But this is nothing to her as affecting a property right. As long as he keeps on his own property, and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so would not be enforcing a right of property, but a rule of morals. It would be controlling and directing his moral conduct by a suit in equity, by an injunction.

To permit a man to cause a certain injurious effect upon the premises of his neighbor by the erection of a structure on his own premises if such structure is beneficial or ornamental, and to prohibit him from causing the same effect in case the structure is neither beneficial nor ornamental, but erected from mo-

tives of pure malice, is not protecting a legal right, but is controlling his moral conduct. In this state a man is free to direct his moral conduct as he pleases, in so far as he is not restrained by statute.

But it is said that such acts are offensive to the principles of equity. Not so. There is no conflict between law and equity in our practice, and what a man may lawfully do cannot be prohibited as inequitable. It may be immoral, and shock our notions of fairness, but what the law permits, equity tolerates. It would be much more inequitable and intolerable to allow a man's neighbors to question his motives every time that he should undertake to erect a structure upon his own premises, and drag him before a court of equity to ascertain whether he is about to erect the structure for ornament or profit, or through motives of unmixed malice.

The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells, or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises and conveyed to the premises of another; but in this case nothing is sent, but the air and light are withheld. A man may be compelled to keep his gas, smoke, odors and noise at home, but he cannot be compelled to send his light and air abroad. *Mullen v. Strickler,* 19 Ohio St. 135.

If smoke, gas, offensive odors, or noise pass from one's own premises to or upon the premises of another to his injury, an action will lie therefor, even though the smoke, gas, odor or noise should be caused by the lawful business operations of defendant and with the best of motives. Broom, Legal Maxims, 372.

In such cases it is the effect or injury, and not the motive, that is regarded. The true test is, whether anything recognized by law as injurious, passes from the premises of one neighbor to that of another. Anything so passing invades the legal rights of him whose premises it reaches, and such rights will be protected. But courts cannot regulate or control the moral conduct of a man, unless authorized so to do by statute.

Following cases, cited by plaintiff in error, bear more or less upon the question involved in this case, and seem to produce a decided weight of authority in his favor: *Frazier v. Brown,* 12 Ohio St. 294; *Falloon v. Schilling,* 29 Kan. 292; *Mahan v. Brown,* 13 Wendell, 261; *Greenleaf v. Francis,* 18 Pick. 123; *Chatfield v. Wilson,* 28 Vt. 49.

The following additional authorities are to the same effect:—

Gould on Waters, section 280, citing: *Chasmore v. Richards,* 7 H. L. Cas., 349; *Dickinson v. G. F. Canal Co.,* 7 Exch., 282;

Acton v. Blundell, 12 M. & W., 324; *Hammond v. Hall,* 10 Sim., 552; *Cooper v. Barber,* 3 Taunt., 99; *Balston v. Bensted,* 1 Camp., 463; *Galgay v. G. S. R'y Co.,* 4 Ir. C. L., 456; *Chase v. Silverstone,* 62 Me., 175; *Ruth v. Driscoll,* 20 Conn., 533; *Brown v. Illius,* 27 Conn., 84; *O. G. C. M. Ass'n v. A. P. Com'rs,* 40 N. J. Eq., 447; *Taylor v. Fickas,* 64 Ind., 167; *Delhi v. Youmans,* 45 N. Y., 362; *Dexter v. Providence Aq. Co.,* 1 Story, 387; *Wheatly v. Baugh,* 25 Pa. St., 528; 64 Amer. Dec., 721, note; *Hough's App.,* 102 Pa. St., 442; 48 Amer. Rep., 193, note; *Haldeman v. Bruckhart,* 45 Pa. St., 514; *Coleman v. Chadwick,* 80 Pa. St., 81; *Trout v. McDonald,* 83 Pa. St., 144; *Lybe's App.,* 106 Pa. St., 626; *Smith v. Adams,* 6 Paige, 435; *Elster v. Springfield,* 49 Ohio St., 82; *Ellis v. Duncan,* 29 N. Y., 466; *Radcliff v. Brooklyn,* 4 N. Y., 195, 200; *Pixley v. Clark,* 35 N. Y., 520; *Goodale v. Tuttle,* 29 N. Y., 466; *Bliss v. Greeley,* 45 N. Y., 671; *Clark v. Conroe,* 38 Vt., 469; *Taylor v. Welch,* 6 Ore., 198; *Mosier v. Caldwell,* 7 Nev., 363; *N. A. R'y Co. v. Peterson,* 14 Ind., 112; *Bassett v. S. Mfg. Co.,* 43 N. H., 573; 30 Cent. L. Jour., 269; 23 Amer. L. Rev., 376; *Davis v. Afong,* 5 Haw., 216.

The defendant in error cites the cases reviewed in *Frazier v. Brown,* 12 Ohio St., 294, and also the case of *Burke v. Smith,* 69 Mich. 380. Most of the cases cited are cases arising out of interference with wells, springs, and percolating waters; such cases bear but slightly upon the question. The Michigan case is substantially like the case under consideration. In that case the lower court enjoined the defendant, and that judgment was affirmed by an equally divided court. The syllabus says that the court being equally divided, nothing is decided. As nothing was decided, the case is not an authority on either side of the question.

But it is strongly urged by counsel for defendant in error, that the maxim, "Enjoy your own property in such a manner as not to injure that of another person," applies in such cases as this, and that as it must be conceded that the fence in question is an injury to the property of defendant in error, that his acts are in conflict with the above maxim.

At first blush this would seem to be so, but a careful consideration shows the contrary. The maxim is a very old one, and states the law too broadly. In this case, for instance, it is conceded that the plaintiff in error had the right to enjoy his property by erecting a house so as to do the same injury which was done by the fence, and that while that would be an injury to the property of defendant in error, she would be without rem-

edy, and his act in erecting such house would not be regarded as violating the maxim.

In *Jeffries v. Williams*, 5 Exch. 797, it was claimed, and in *Railroad Company v. Bingham*, 29 Ohio St. 369, it was held, that the true and legal meaning of the maxim is, "So use your own property as not to injure *the rights* of another." Boynton, J., in that case says: "Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong." The maxim should be limited to causing injury to the *rights* of another, rather than to the *property* of another, because for an injury to the rights of another there is always a remedy, but there may be injuries to the property of another for which there is no remedy, as in draining a spring or well, or cutting off light and air or a pleasant view by the erection of buildings, and many other cases which might be cited.

Thus limiting the maxim to the rights of the defendant in error, it is plain that the acts of plaintiff in error in the use which he made of his property did not injure any legal right of hers and that therefore what he did was not in violation of such maxim.

The circuit court erred in overruling the demurrer to the petition, and in rendering judgment in favor of defendant in error upon the facts as found by the court. The judgment of the circuit court is therefore reversed, and, proceeding to render such judgment as the circuit court should have rendered upon the facts found, the petition of plaintiff below is dismissed at her cost.

Judgment reversed.

NORTON v. RANDOLPH.

SUPREME COURT OF ALABAMA. 1912.

[176 *Alabama Reports* 381.]

* SOMERVILLE, J. The bill is filed by the appellee, Randolph, against the appellant, Mrs. Norton, seeking to abate an alleged nuisance erected by her on a vacant lot adjoining his residence property in the city of Birmingham. The averments of the bill are substantially as follows: Complainant is the owner of a lot on which he has erected for selling or renting a valuable dwelling house, costing about $6,000. This dwelling is in a desirable part of the city, and many other dwellings of like character have been erected on the same street. Respondent owns a vacant lot, immediately adjoining complainant's lot, "which is vacant

* Only the opinion of the court is given.—*Ed.*

and unimproved property and is not used by her for any purpose." She has nevertheless erected on said vacant lot, within three or four feet of complainant's house, "a large plank wall or structure about 20 feet high and 30 feet long, by means of which she has almost entirely excluded the air and light from the rooms on that side." This structure is alleged to be useless, and also unsafe, in that it endangers the adjoining dwelling by its liability to be blown over and thus cause damage thereto. It is further alleged that this structure "does not serve any useful purpose, nor add any value to the property of the said Laura J. Norton"; and that complainant "does not know for what purpose said structure was erected by the said Laura J. Norton, unless it was for the purpose of vexing, annoying, and injuring" him, "by preventing him from using his property, either by sale or rent; and that it has prevented his selling or renting said property, and its selling or renting value has been greatly diminished thereby." Respondent demurred to the bill as a whole, and assigned the following grounds: "(1) For that there is no equity in said bill. (2) For that complainant has an adequate remedy at law for the matters and things complained of therein. (3) For that it does not sufficiently appear therefrom that the said wall or structure alleged to have been erected by defendant is a nuisance. (4) For that it is not sufficiently shown that the said wall or structure erected by defendant is dangerous, unsafe, or defective, or was not erected with proper and necessary skill and care, nor that same is unsafe in such way or measure as to constitute same a nuisance. (5) For that it does not sufficiently appear from the bill that defendant's erection of said wall or structure on her lot was not lawful nor in the exercise of her subsisting legal rights, nor that she has thereby interfered with complainant or his property, or his legal rights or privileges." The chancellor overruled the demurrer, and the appeal is from that decree.

The jurisdiction of equity to abate nuisances by injunction is too well settled to require discussion. The main question therefore involved in this case is whether the allegations of the bill, which are admitted to be true by the demurrer, establish such a nuisance as to justly invoke the intervention of a court of equity.

We think it clear that the averments of the bill are insufficient to show that the structure complained of is dangerous to the safety of complainant's premises in such sense as to constitute a nuisance, and the grounds of demurrer pointing out this defect should have been sustained had they been directed and limited to that aspect of the bill. But, being directed to the

whole bill, they were properly overruled if the bill had equity in some other aspect.

We come then to the decisive questions raised by the fifth ground of demurrer: Is the structure described in the bill brought by appropriate averment within the class known in legal parlance as "spite fences"; that is, was it erected by respondent solely for the malicious purpose of vexing and injuring complainant in the lawful use and enjoyment of his dwelling house, and was it at the same time devoid of all benefit or value to respondent in the use or improvement of her property? And, if so, is it legally a nuisance?

It is of course true, as argued by appellant, that the old English doctrine of ancient lights is not, and never has been, in force in this state. *Ward v. Neal,* 37 Ala. 500. And the general rule is well settled that the owner of land has no right as against adjoining owners to the unobstructed access of light and air to his premises over adjoining premises, unless such right has been acquired by grant express or implied.

Many of the cases dealing with the subject of malicious structures like the one here complained of are cited and reviewed in a case note to *Koblegard v. Hale,* 60 W. Va. 37, 53 S. E. 793, 116 Am. St. Rep. 868, 9 Ann. Cas. 732-734, and the great weight of authority, it must be conceded, is opposed to the equity of complainant's bill. *Bordeaux v. Greene,* 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600; *Metzger v. Hochrein,* 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841; *Guethler v. Altman,* 26 Ind. App. 587, 60 N. E. 355, 84 Am. St. Rep. 313; *Fisher v. Feige,* 137 Cal. 39, 69 Pac. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77.

The doctrine of these cases, based on the alleged right of the owner of land to use it according to his malicious fancy, and without any advantage to himself or his land, for the sole purpose of injuring his neighbor in the lawful and beneficial use of his adjoining property, has been carried to such an extent as in many cases to be justly characterized as "odious." And hence statutes have been passed in a number of states abrogating the principle on account of the unjust and injurious effects resulting from its enforcement.

The authority of precedents, however, must often yield to the force of reason, and to the paramount demands of justice as well as the decencies of civilized society, and the law ought to speak with a voice responsive to these demands.

We have examined the decisions and the reasoning of the various courts upon this question; and, unfettered by any precedents of our own, we are led to the deliberate conclusion that

the majority view, as above stated, is founded upon a vicious fallacy, and is violative of sound legal principle as well as of common justice.

This conclusion has already found eloquent and forcible expression in decisions of the Supreme Courts of Michigan and North Carolina. *Burke v. Smith,* 69 Mich. 380, 37 N. W. 838; *Flaherty v. Moran,* 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. Rep. 510; *Kirkwood v. Finegan,* 95 Mich. 543, 55 N. W. 457; *Peek v. Rowe,* 110 Mich. 52, 67 N. W. 1080; *Barger v. Barringer,* 151 N. C. 433, 66 S. E. 439, 25 L. R. A. (N. S.) 831, 19 Ann. Cas. 472. And, it may be added, its underlying reasons have been convincingly stated in the decisions of several other states in the course of opinions dealing with and sustaining the constitutionality of statutes making certain malicious and nonuseful structures unlawful. *Horan v. Byrnes, 72* N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670; *Rideout v. Knox,* 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560.

As said by Parsons, C. J., in *Horan v. Byrnes, supra:* "The conclusion that a landowner's property right in real estate includes the right to use it solely for the injury and annoyance of his neighbor, without intending to subserve any useful purpose of his own, is based upon a narrow view of the effect of the land titles, and is reached by the strict enforcement of a technical rule of ownership briefly expressed in an ancient maxim, *'Cujus est solum, ejus est usque ad coelum.'* . . . Because when employed for a useful purpose such use may rightfully injure another, it does not follow that the same use for a wrongful purpose may also rightfully injure another, except upon the theory of absolute dominion, for the character of the use is an element of the right. . . . As, therefore, the statute does not deprive the plaintiff of any right to a reasonable use of his land, but only prohibits an unnecessary, unreasonable use, it does not deprive him of any property right."

And as said by Holmes, J., in *Rideout v. Knox, supra:* "But it is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends."

We approve the judicial reasoning as well as the Christian ethics of the Michigan court as expressed in the language of Morse, J., in *Burke v. Smith, supra:* "If a man has no right to dig a hole on his premises, not for any benefit to himself or his premises, but for the express purpose of destroying his neigh-

bor's spring, why can he be permitted to shut out light and air from his neighbor's windows maliciously and without profit or benefit to himself? By analogy, it seems to me that the same principle applies in both cases, and that the law will interpose and prevent the wanton injury in both cases. . . . It must be remembered that no man has a legal right to make a malicious use of his property . . . for the avowed purpose of damaging his neighbor. To hold otherwise would be to make the law a convenient engine in cases like the present to injure and destroy the peace and comfort, and to damage the property of one's neighbor, for no other than a wicked purpose, which in itself is or ought to be unlawful. The right to do this cannot in an enlightened country, exist either in the use of property or in any way or manner. . . . The right to breathe the air, and to enjoy the sunshine, is a natural one; and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice toward his neighbor. . . . I do not think the common law permits a man to be deprived of water, air, or light for the mere gratification of malice."

We quote also the following language of Brown, J., in *Barger v. Barringer, supra,* adopted by the North Carolina court: "There are many annoyances arising from legitimate improvement and business which those living near must endure, but no one should be compelled to submit to a nuisance created and continued for no useful end, but solely to inflict upon him humiliation as well as physical pain. The ancient maxim of the common law, 'Sic utere tuo, alienum non laedas,' is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said, 'Love thy neighbor as thyself.' Freely translated, it enjoins that every person in the use of his own property should avoid injury to his neighbor as much as possible. No one ought to have the legal right to make a malicious use of his property for no benefit to himself, but merely to injure his fellow man. . . . The doctrine of private nuisance is founded upon this humane and venerable maxim of the law. If it can be successfully invoked to prevent the keeping of stables and hogpens so near one's neighbor as to cause discomfort, why cannot he whom it is sought to needlessly and maliciously deprive of air and sunlight also seek the aegis of its protection? The right thus to injure one's neighbor with impunity cannot long continue to exist anywhere in an enlightened country where God is acknowledged and the Golden Rule taught. On this subject, if need be, we will do

better to follow the pandects of the heathen Romans, whose jurists have inculcated a doctrine more consistent with the teachings of Him whom they permitted to be crucified, than to be governed by the principles of the common law as expounded by some Christian courts and text-writers."

But little else remains to be said in support of the rule of reason and good morals. The rule of malice was, we think, conceived in error, and has indeed become a Caliban of the law—the ugly and misshapen offspring of a decent and honorable parentage—and we are unwilling to sanction in this jurisdiction its evil and odious sway. We therefore hold that there is equity in the bill of complaint.

As a matter of pleading, however, we think the averments of the bill are not sufficient to bring the case clearly within the rule above enunciated. It should be distinctly alleged, not only that the structure complained of is entirely useless to the respondent, and without value to her property, but also that it was maliciously erected for the purpose of injuring complainant in the use and enjoyment of his property. It may be conceded that the facts stated in the bill are sufficient to justify the inference of malice as a matter of evidence merely, but they may conceivably be consistent also with its absence; and, on demurrer, the averments of fact must of course be strictly construed against the pleader in so far as opposing conclusions may be drawn. Nor does the averment that complainant "does not know for what purpose said structure was erected, . . . unless it was for the purpose of vexing, annoying, and injuring" him, meet the requirements of good pleading as to the assumption of the burden of proof by complainant in this regard.

The fifth ground of demurrer should therefore have been sustained, and to that extent the decree of the chancellor will be reversed and a decree here rendered to that effect.

Reversed and rendered. All the Justices concur.

KUZNIAK v. KOZMINSKI.

SUPREME COURT OF MICHIGAN. 1895.

[107 *Michigan Reports* 444.]

LONG, J. The parties to this cause own adjoining lots in the city of Grand Rapids. Defendants' lot is on the southeasterly corner of Eleventh and Muskegon streets, and upon which is a large tenement house facing both streets. The complainant owns the lot immediately south and adjoining the defendants', and upon which he has a dwelling house facing Muskegon street, and also a tenement house about 60 feet back from Muskegon

street, and within 22 inches of the north line, being the line of defendants' lot. At the time this tenement house was erected, defendants had upon their lot what was called a "chicken shed"; and, after complainant's tenement house was erected, defendants moved this chicken shed upon a part of their lot directly opposite complainant's tenement house, and within 24 inches of the lot line, and converted it into a coal and wood house for the use of their tenants, who occupied the dwelling on said lot. This bill was filed by complainant for the purpose of having this coal and wood house of defendants declared a nuisance, and to compel them to remove the same. The claim made by the bill is that the defendants removed the building to that place through spite and for a malicious motive, and not because it was needed for any useful purpose. Defendants answered the bill, denying that they were actuated by malice in putting the building there, and averred that it was so placed for the use of their tenants for wood and coal. The testimony was taken in open court, and the court found that the building was a nuisance, and a decree was entered directing the defendants to remove the building within 60 days from the date of the decree, and that, in default of such removal, the sheriff of the county remove the same, at the cost and expense of defendants. The complainant was awarded the costs of the suit. Defendants appeal.

It was held in *Flaherty v. Moran,* 81 Mich. 52, that a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, was a nuisance, and the decree of the court below ordering its removal was affirmed; but that decision was placed on the ground that the fence served no useful purpose, and was erected solely from a malicious motive. In the present case the building erected by the defendants was for a useful purpose; and, while there may have been some malice displayed in putting it so near the complainant's house as to shut off some of the light, that would not be a sufficient reason upon which to found a right in complainant to have the building removed. Defendants had a right to erect a building upon their own premises, and the decisions have been quite uniform to the effect that the motives of a party in doing a legal act cannot form a basis upon which to found a remedy. In *Allen v. Kinyon,* 41 Mich. 282, it was held that the motive is of no consequence when the party does not violate the rights of another. In *Hawkins v. Sanders,* 45 Mich. 491, it was held that there was no right of prospect which would prevent the erection of an awning on a neighboring lot. The case does not fall within the rule of *Flaherty v. Moran, supra,* and the court below was in error in directing the removal of the building. That de-

cree must be reversed, and a decree entered here dismissing complainant's bill, with costs of both courts to the defendants.

The other Justices concurred.

STATUTES AND AMENDMENTS TO THE CODES OF CALIFORNIA. 1913. CHAPTER 197.

Section 1. Any fence or other structure in the nature of a fence, unnecessarily exceeding ten feet in height maliciously erected or maintained for the purpose of annoying the owner or occupants of adjoining property, shall be deemed a private nuisance.

Section 2. Any such owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance may enforce the remedies against the continuance of the same prescribed in title III, part III of the Civil Code of the State of California.

RIDEOUT v. KNOX.

SUPREME COURT OF MASSACHUSETTS. 1889.

[148 *Massachusetts Reports* 368.]

Tort against David Knox and Elizabeth E. Knox, his wife. The declaration was as follows:

"And the plaintiff says that he is the owner and occupant of a lot of land situate on Johnson Street, in the city of Lynn, in said county, upon which stands his residence, numbered eight in the numbering of the buildings on said Johnson Street, and bounded southeasterly by a lot of land on said Johnson Street owned by the defendants, upon which the house occupied by the defendants as a dwelling now stands. And the plaintiff says that the defendants have maliciously erected and maliciously maintain on their said lot of land, for the purpose of annoying the plaintiff, a fence, or other structure in the nature of a fence, from near the front of said lot on Johnson Street, along the line or near the line which divides the lot of land of the plaintiff from that of the defendants; that said fence or structure unnecessarily exceeds the height of six feet, and injures the plaintiff in his comfort and the enjoyment of his said estate. Wherefore, an action hath accrued to the plaintiff to recover of the defendants the damages sustained thereby, according to the provisions of chapter 348 of the statutes of the year 1887."*

* This statute, entitled "An act in relation to fences and other structures erected to annoy, and for the abatement of nuisances," and "Approved June 2, 1887," is as follows:

"Section 1. Any fence or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or main-

At the trial in the Superior Court, before Lathrop, J., the evidence showed that the plaintiff and the defendants were the occupants of adjoining estates on Johnson Street in Lynn; that the structure complained of, which was about seventy-five feet long and eleven feet high, and composed of slats set into posts, was erected in November, 1886, on the order of Mrs. Knox, with the concurrence and assent of her husband, on her land, against the fence which stood on the line dividing the estates of the parties; that the structure was about two and a half feet from some of the windows of the plaintiff's house, and about six inches from one window, the lower part of which was of ground glass; that the cost for material and labor therefor was paid by David Knox out of his own funds, and the bill thereof was made to his wife; that they both agreed upon the form, character, and location of the structure; that David Knox was present while the structure was being erected, and gave directions to the workmen; that it was built for the accommodation of David Knox, and was used by him from the time of construction to the time of the trial; that Mrs. Knox, when notified and requested by the plaintiff to remove the structure, after the St. of 1887, c. 348, took effect, replied that she would have nothing to say about it, as she had left it all to her husband; and that David Knox paid the household expenses and resided at and on the estate, the legal title to which had been in his wife since January 14, 1884.

David Knox testified that the structure in question was erected as a trellis on which to trail vines, and not for the purpose of injuring the plaintiff in the comfort or enjoyment of his estate.

The defendants asked the judge to rule:

"1. That the plaintiff had no action, as chapter 348 of the Acts of the year 1887 was unconstitutional.

"2. That the structure must be erected for the sole purpose of annoyance; even if a motive to annoy existed, if it was inferior to a motive of use or adornment of the defendants' estate, and if there was a *bona fide* use of the structure, beneficial to the defendants, the plaintiff cannot recover.

"3. This action must be discontinued as to David Knox, there being no title in him to the premises on which the structure was erected."

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tained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance.

"Section. 2. Any such owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an action of tort for the damage sustained thereby, and the provisions of chapter one hundred and eighty of the Public Statutes concerning actions for private nuisances shall be applicable thereto."

The judge declined to give the first ruling requested, but ruled that the statute was constitutional; defined the terms "maliciously" and "unnecessarily"; and gave other instructions appropriate to the case.

As to the second request for instructions, the judge, after instructing the jury that the plaintiff must prove that the structure was maliciously maintained for the purpose of annoying the plaintiff, and that "annoying" meant "injuring" the plaintiff, either in his comfort or the enjoyment of his estate, instructed the jury as follows: "The defendants say the structure was not put up for any such purpose; that it was put up for a perfectly legitimate purpose, namely, as a trellis on which to train vines. If you believe that that was the sole purpose for which the structure was put up, then the plaintiff has not made out his case. But if the defendants had in mind in maintaining the structure, or if it was their intention in maintaining it, not only to use it for the purpose of training vines, but also for the purpose of injuring the plaintiff, either in his comfort or in the enjoyment of his estate, then the plaintiff has made out that part of his case."

As to the third request for instructions, the judge instructed the jury as follows: "The rule of law is, that if a person does or directs the doing of an act which cannot be done at all without constituting and creating a nuisance, he is personally responsible, whether he is acting for himself, or for the benefit of another. If Mr. Knox directed this thing, took part in its erection, either personally or by overseeing it, and you find that it is a nuisance, within the rules already stated, then the fact that he was not the owner of the estate will not prevent his being held liable."

The jury returned a verdict for the plaintiff for the sum of one cent; and the defendants alleged exceptions.

J. R. Baldwin, for the defendants.

W. H. Niles and *G. J. Carr,* for the plaintiff.

HOLMES, J. This is an action of tort, under the St. of 1887, c. 348. The plaintiff has had a verdict for nominal damages, and the first question raised by the bill of exceptions is the constitutionality of the statute. Another question more or less connected with the former is whether the structure, in order to bring it within the act, must be erected or maintained for the purpose of annoyance as the dominant motive, or whether it is enough if that purpose existed, although subordinate to a *bona fide* use for legitimate purposes.

At common law, a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct

his neighbor's light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only. *Walker v. Cronin,* 107 Mass. 555, 564. *Chatfield v. Wilson,* 28 Vt. 49. *Phelps v. Nowlen,* 72 N. Y. 39. *Frazier v. Brown,* 12 Ohio St. 294. Martin, B., in *Rawstron v. Taylor,* 11 Exch. 369, 378, 384. See *Benjamin v. Wheeler,* 8 Gray, 409, 413.

But it is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends. It has been thought by respectable authorities, that even at common law the extent of a man's rights in cases like the present might depend upon the motive with which he acted. *Greenleaf v. Francis,* 18 Pick. 117, 121, 122. See *Carson v. Western Railroad,* 8 Gray, 423, 424; *Roath v. Driscoll,* 20 Conn. 533, 544; *Wheatley v. Baugh,* 25 Penn. St. 528; *Swett v. Cutts,* 50 N. H. 439, 447.

We do not so understand the common law, and we concede further, that to a large extent the power to use one's property malevolently, in any way which would be lawful for other ends, is an incident of property which cannot be taken away even by legislation. It may be assumed, that, under our Constitution, the Legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent, and thus to make a large part of the property of the Commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner.

But it does not follow that the rule is the same for a boundary fence unnecessarily built more than six feet high. It may be said that the difference is only one of degree: most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be, except by the exercise of the right of eminent domain. *Sawyer v. Davis,* 136 Mass. 239, 243.

The statute is confined to fences and structures in the nature of fences, and to such fences only as unnecessarily exceed six feet in height. It is hard to imagine a more insignificant curtailment of the rights of property. Even the right to build a fence above six feet is not denied, when any convenience of the owner would be served by building higher. It is at least doubt-

ful whether the act applies to fences not substantially adjoining the injured party's land. The fences must be "maliciously erected or maintained for the purpose of annoying" adjoining owners or occupiers. This language clearly expresses that there must be an actual malevolent motive, as distinguished from merely technical malice. The meaning is plainer than in the case of statutes concerning malicious mischief. *Commonwealth v. Walden,* 3 Cush. 558. See *Commonwealth v. Goodwin,* 122 Mass. 19, 35.

Finally, we are of opinion that it is not enough to satisfy the words of the act that malevolence was one of the motives, but that malevolence must be the dominant motive,—a motive without which the fence would not have been built or maintained. A man cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons even if that pleasure should be denied him. If the height above six feet is really necessary for any reason, there is no liability, whatever the motives of the owner in erecting it. If he thinks it necessary and acts on his opinion, he is not liable because he also acts malevolently.

We are of opinion that the statute thus construed is within the limits of the police power, and is constitutional, so far as it regulates the subsequent erection of fences. To that extent, it simply restrains a noxious use of the owner's premises, and although the use is not directly injurious to the public at large, there is a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go. See *Commonwealth v. Alger,* 7 Cush. 53, 86, 96; *Watertown v. Mayo,* 109 Mass. 315; *Train v. Boston Disinfecting Co.* 144 Mass. 523. See also *Talbot v. Hudson,* 16 Gray, 417, 423.

Whether the statute is constitutional with reference to fences already in existence when the act was passed, is a more difficult question. We are compelled to construe the act as applying to all fences maintained after it goes into operation. If a fence which was built before the act, and is simply allowed to stand, may be found to be a nuisance, and abated at the expense of the owner, there is a taking of property without compensation which is more marked and significant than in the case of a simple prohibition to build. *Commonwealth v. Alger,* 7 Cush. 53, 103. But the case is not so hard as it seems. If the owner of the fence gave leave to the party complaining to take it down, it would show conclusively that the fence was no longer maintained by

him for malevolent motives, and therefore would defeat an action for subsequent annoyance. On the whole, having regard to the smallness of the injury, the nature of the evil to be avoided, the quasi accidental character of the defendant's right to put up a fence for malevolent purposes, and also to the fact that police regulations may limit the use of property in ways which greatly diminish its value, we are of opinion that the act is constitutional to the full extent of its provisions. See *Mugler v. Kansas,* 123 U. S. 623; *Kidd v. Pearson,* 128 U. S. 1.

We are of opinion, however, that the exceptions must be sustained on the ground that the construction of the statute embraced in the second request for a ruling was substantially correct, as we have stated, whereas it appears that the request was refused, and the jury were instructed otherwise.

This fence was built before the act of 1887 was passed. The statute could not make the conduct of David Knox, in 1886, unlawful retrospectively. Help given by him in lawfully building the fence on his wife's land did not of itself make him liable, whatever his motives, and did not tend to prove that he maintained the fence. There was no evidence that he did so unless it is to be found in the ambiguous statement that he used it, which does not seem to have been the ground on which the case was allowed to go to the jury. The reply of Mrs. Knox in his absence was not evidence against him. As the exceptions must be sustained upon another ground, it is unnecessary to say more on this branch of the case.

Exceptions sustained.

KLEEBAUER v. WESTERN FUSE AND EXPLOSIVES COMPANY.

SUPREME COURT OF CALIFORNIA. 1902.

[69 *Pacific Reporter* 246.]

COOPER, C. This action was brought to recover damages for injuries to plaintiff's house, caused by reason of the explosion of a large quantity of gunpowder on defendant's premises. The case was tried with a jury, and a verdict returned for plaintiff, upon which judgment was entered. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order. The facts are substantially as follows: For several years prior to the explosion the defendant had been engaged in the business of manufacturing fuse, and had its plant and magazine in the village of Melrose. Within a radius of 250 yards of the magazine there were many dwelling houses, of which plaintiff's was one, the vicinity being regularly laid out in

streets. Defendant had in its magazine, immediately prior to the explosion, about 5,000 pounds of gunpowder, being the amount it usually kept on hand. In the employ of defendant was a Chinaman, whose business it was to carry powder from the magazines to the hoppers, from which the powder was distributed. The Chinaman, during a quarrel with one of his countrymen, killed him, and then fled into the magazine to evade arrest. While the officers of the law were making an attempt to arrest him, he willfully, and with murderous intent, set fire to the magazine, exploding it, killing some of the officers and himself, and causing the injury to the plaintiff's dwelling. The court below instructed the jury that if the defendant kept and stored in its magazine a large quantity of gunpowder in a thickly-settled neighborhood, and so near thereto that its explosion was liable to injure persons, dwellings, or other property in the neighborhood, the so keeping said powder was a nuisance; and the jury, by its verdict, found by implication that it was a nuisance.

It is settled by the great weight of authority that the keeping of a dangerous explosive, such as gunpowder or nitroglycerine, in large quantities, in a public place, or in close proximity to buildings inhabited by human beings, is a nuisance *per se*. Webb, Pol. Torts, note on page 503, and cases cited: *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734; *Myers v. Malcolm*, 6 Hill, 293, 41 Am. Dec. 744; *Coal Co. v. Glass*, 34 Ill. App. 364; *Weir's Appeal*, 74 Pa. 230; *McAndrews v. Collerd*, 42 N. J. Law, 189, 36 Am. Rep. 508. In the latter case it is said: "The keeping of gunpowder, nitroglycerine, or other explosives, in large quantities, in the vicinity of a dwelling house or place of business, is a nuisance *per se*, and may be abated as such by action at law or injunction in equity." And in this case the question was properly left to the jury under appropriate instructions. *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Rudder v. Koopman*, 116 Ala. 333, 22 South. 601, 37 L. R. A. 489. Therefore the defendant was guilty of maintaining a nuisance in keeping the large quantity of powder in so populous a neighborhood.

Is it liable to plaintiff for damages caused by the explosion, that being caused by the criminal act of the Chinaman? We are of opinion that it is, and the fact that the Chinaman, by his act was the direct cause, can make no difference. The fact that defendant maintained the nuisance was a violation of legal duty. If it had not maintained the nuisance, the damage would not have occurred. Powder is regarded by all the authorities as a destructive agent, liable to explosion by contact with the smallest spark, and often by the elements. The maxim, "Sic utere tuo ut alienum non laedas," applies. The plaintiffs had the right to

the free use and enjoyment of their property. The defendant, in maintaining the nuisance upon its own land, for its own profit, caused the damage. The thing constituting the nuisance was the property of defendant, the Chinaman its servant, and, although he turned aside from his employment in setting fire to the powder, yet the defendant, on principles of public policy, must be held liable. The defendant's violation of legal duty and willful disregard of the property rights of others indirectly caused the damage. The principle is correctly stated by Mr. Justice Blackburn in *Fletcher v. Rylands,* 1 Exch. 265: "We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. . . . But for his bringing it there, no mischief could have accrued, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law whether the things so brought be beasts, or water, or filth, or stenches." This language was repeated and approved by Lord Cranworth on appeal. 3 H. L. Cas. 330. The same reason applies to explosives. The party bringing upon his premises, in the vicinity of other dwelling houses, large quantities of powder or other explosives, does so at his peril. In this case, if the defendant had not brought and kept the powder on its premises, the Chinaman could not have exploded it. In 1 Hale, P. C. 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner "must at his peril keep him up safe from doing hurt, for, though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." We can see no difference in principle whether the thing be an animal or a dangerous explosive. The defendant knew the nature of the thing kept, its liability to explosion, and it kept it at its peril. The American authorities, with hardly an exception, follow the doctrine laid down in the courts of England. It is said in 1 Wood, Nuis. (3d. Ed.) p. 183: "So the keeping of gunpowder, nitroglycerine, damp jute, or other explosive substance, in large quantities, in the vicinity of one's dwelling house or place of business, is a nuisance, and may be abated as such by action at law, or by injunction from a court of equity; and, if actual injury results therefrom, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other persons, and is not

chargeable to his personal negligence." In the case of *Heeg v. Licht,* 80 N. Y. 581, 36 Am. Rep. 654, the powder in defendant's magazine exploded from an unknown cause. The action was for damages caused by the explosion. In the opinion the court said: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might, in some localities, render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business when free from negligence has no application." In a later case (*Prussak v. Hutton* (Sup.) 51 N. Y. Suppl. 761) the powder magazine was so near to dwelling houses that it was held to be a nuisance *per se,* and the owner liable, although the explosion was caused by lightning. The court said, "The defendants at least were not free from fault which cooperated to produce the result." In another case by a different plaintiff for damages caused by the same explosion (*Cibulski v. Same* (Sup.) 62 N. Y. Suppl. 167) the court again affirmed the rule, saying: "The recovery was not placed upon the ground of defendant's negligence, but upon evidence sufficient to support the finding of the jury that the powder mill, in the place where it was situate, with reference to the dwelling in which the plaintiff in that case was injured, was a nuisance." In *Coal Co. v. Glass,* 34 Ill. App. 364, the damage was caused by an explosion of the powder magazine by lightning, and the defendant was held liable. The court said: "We do not think it necessary that the proof should show any immediate and direct agency on the part of the appellant causing any injury, when the original or primary cause was the establishment of a public nuisance by it." In a later case (*Powder Co. v. Tearney,* 131 Ill. 325, 23 N. E. 390, 7 L. R. A. 262, 19 Am. St. Rep. 34), in which the explosion was caused by lightning, the court said: "As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury result from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence." In *Cheatham v. Shearon,* 1 Swan. 213, 55 Am. Dec. 734, the defendant was held liable for damages by the explosion of a powder magazine by lightning. The court said: "The fact that it is liable to explode by means of lightning, against which no human agency can guard, is decisive of the question." In *Wilson v. Powder Co.* (W. Va.) 21 S. E. 1035, 52 Am. St. Rep. 890, the cause of the explosion was unknown, but the defendant was held liable, and the court said: "Was the defendant maintaining a public nuisance? If it was, it was en-

gaged in the commission of a public wrong, and, injury resulting therefrom to the plaintiff, the defendant must repair such injury." And further, in the same opinion: "If damage happen to a person from explosion, the injured party is entitled to compensation without proving negligence on the part of defendant. He is injured by that which breaks the law made for his protection,—the law against public nuisance. He is in no fault, while the other man is, and he has received damages from that other man's wrongful act. He has a right to immunity from this injury, and the other man owes him the duty of securing him immunity." In a very late case in Ohio (*Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528, 45 L. R. A. 658, 71 Am. St. Rep. 740) the question is elaborately discussed, and it was held that one who stores nitroglycerine on his own premises is liable for injuries to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage nor is chargeable with negligence contributory to the explosion. In *Powder Co. v. Volger*, 7 C. C. A. 130, 58 Fed. 153, defendant was held liable for damages caused by the explosion of its powder magazine from an unknown cause. It was said: "It is liable for the injuries resulting from its explosion from any cause, because its location under the ordinance made it a nuisance." In *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744, the defendant was held liable where the explosion was caused by the building in which the powder was stored taking fire. The court said: "The situation of the building was such as to render the gunpowder dangerous to the lives of the citizens, for an explosion, either by accident or design, at any period after the deposit, would in all human probability have proved destructive to more or less of the inhabitants residing in the neighborhood." In *McAndrews v. Collerd*, 42 N. J. Law, 189, 36 Am. Rep. 508, the damage was caused by the explosion of blasting materials from an unknown cause; and the chancellor, in delivering the opinion, held that depositing such materials in the vicinity of a dwelling house is a nuisance *per se*, and that, if injury results therefrom, the person so keeping them is liable, "even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence." It is said in Webb, Pol. Torts (Am. Ed.) p. 615: "The risk incident to dealing with fire, firearms, explosives, or highly inflammable matters, corrosive or other dangerous or noxious fluids, and (it is apprehended) poisons, is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term 'consummate care' is used to describe the amount of caution required, but it is doubtful

whether even this be strong enough. At least we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him." It is a maxim of our law "that no one should suffer by the act of another." Civ. Code, Sec. 3520. In this case, if the plaintiffs, whose property was injured, must suffer, it would, at least to some extent, be by the act of the defendant. The defendant, by its acts in bringing and storing the large quantity of powder near plaintiff's property, violated the law. Such violation of law, together with the act of the Chinaman, caused the damage. It is claimed that this is a very singular case, and the only one of the kind in the books, and that it should be distinguished from the lightning cases, because it is possible to so insulate a powder magazine that lightning will not strike it. It would have been possible for defendant to have kept matches from the person of the Chinaman while working around the powder magazine. It would have been possible, and it was the defendant's duty, to keep its magazine in such locality that, if it exploded, it would not have injured the plaintiff's property.

It follows that the judgment should be affirmed.

We concur: GRAY, C.; SMITH, C.

Per Curiam: For the reasons given in the foregoing opinion, the judgment is affirmed.

KLEEBAUER v. WESTERN FUSE AND EXPLOSIVES COMPANY.

SUPREME COURT OF CALIFORNIA. 1903.

[138 *California Reports* 497.]

* VAN DYKE, J. This is an action for damages. It is alleged in the complaint that defendant was at the time, and prior to the nineteenth day of July, 1898, engaged in manufacturing and storing powder, dynamite, nitroglycerine, and other high explosives and fuses on its premises near Melrose in Alameda County, and that, by reason of the negligence and carelessness of the defendant, a large quantity of fuse and explosives belonging to it, and under its control, on said day exploded with great violence, whereby plaintiffs' house was injured and damaged to the extent of four hundred dollars, for which amount damages are claimed. The answer denies that the defendant was engaged in the manufacture or storage of powder, dynamite, nitroglycerine, or other high explosives, but admits that it was the owner of and operating a factory for the manufacture

* Only the opinion of the court is given.—*Ed.*

of fuse on its premises; and denies that, by reason of the premises mentioned in the plaintiffs' complaint, or by reason of any negligence or carelessness on the part of the defendant, plaintiffs have been, or ever were, damaged in any sum whatever.

The action was tried in the superior court of San Francisco, before a jury, and resulted in a judgment for the plaintiff, from which and an order denying defendant's motion for a new trial an appeal was taken.

There seems to be not much conflict in reference to the facts of the case. In July, 1898, at the time of the explosion, and for over ten years prior thereto, defendant corporation was carrying on the business of manufacturing fuse near San Leandro Bay, in the county of Alameda, near a station called Melrose. There were other fuse works there besides that of the defendant, and there were in the vicinity dwelling houses scattered here and there about the manufactory. The place was platted in streets, but there were only two roads or ways through the vicinity. One was called High Street, the other Clark Street. In the testimony of witness Clark, a civil engineer, he says: "High Street is open and macadamized, Clark Street is a road that is in pretty fair condition only,—that is, simply open,—and a wagon might go through it by picking out the better places." It is outside the limits of both Oakland and Alameda, and within the township of Brooklyn. The company's grounds contained about an acre and a half. A tight board fence, six feet and over in height in the lowest place, and six feet seven inches in the highest, with a run of barbed wire on top, inclosed the buildings in which the company carried on its operations. One of these buildings was a powder magazine. This was a brick structure, about fourteen by sixteen feet, and eight or ten feet high, covered with metal, and the floor lined with thick linoleum, and was situated in the corner of the inclosure, and in another corner was the residence of the superintendent. The powder used in the manufacture of fuse is ordinary black powder, kept in round metal cans. The company did not manufacture the powder, but it was brought on the premises and stored in the magazine, to be used as required in the manufacture of fuse. The gunpowder was taken from the magazine to the loft or upper story of another small building, and thence poured into small tin hoppers, funnel-shaped, with an orifice leading through the floor to the room below. Each orifice has a thread drawn through it, and as the thread which thus passes through the gunpowder in the hopper leaves the funnel in the room below, it is wound with other threads and twisted so that it becomes the center thread of the

twist. Afterwards this twist is covered with tape and becomes a ropelike fuse, used for the purpose of conveying a spark from a distance to the explosive in blasting operations.

The superintendent of the company in his testimony says that the works were located near the slough running into San Leandro Bay, and that within one hundred feet of the works it was all marshy to San Leandro Bay. In the vicinity of the fuse works there were fields under cultivation. The plaintiffs went there and built their house over five years after the defendant company had been in operation, and it does not appear from the evidence whether, at the time the defendant located there and commenced its business, there were any residences or other buildings in the vicinity, but at the time of the explosion there were quite a number of buildings in the neighborhood.

About three o'clock in the afternoon of the 18th of July, 1898, a quarrel arose between a Chinaman named Quong Ng Chong and another Chinaman within the inclosure in which the company's works were situated. Quong Ng Chong had for many years been employed by the company. His business was to go to the magazine and bring the powder over to the spinning-room whenever it was necessary. He was a man of good reputation for peace and quiet. The Chinaman with whom he quarreled was a vegetable dealer who sold vegetables to the men employed in the fuse works. Quong Ng Chong suddenly killed him, and after perpetrating the murder, taking advantage of the excitement caused, he fled into the magazine. He then piled in the doorway of the magazine a number of the metal cans in which the gunpowder was kept, and by that means filled up the doorway of the magazine while he remained inside. He then announced that if any sheriff, policeman, or other person attempted to arrest or take him he would set fire to the gunpowder. The sheriff of Alameda County and several deputies promptly arrived at the fuse works to arrest the murderer. The afternoon was spent in vain endeavors to induce the Chinaman to come out of the magazine, but he had a pistol, and declared he had matches, and he could not be induced to leave. Late in the evening the employees of the company left the place in charge of the sheriff and several armed deputy sheriffs. They remained on guard during the night. About five o'clock next morning, in consequence of an attempt then made to arrest him, the Chinaman carried out his threat and set fire to the gunpowder. The magazine exploded, destroying defendant's factory, killing some of the deputy sheriffs, and injuring the dwelling-house of the plaintiff in this action.

In submitting the cause to the jury the court gave the following instruction, among others: "A magazine of powder so situated that, in case of explosion from any cause, it is liable to injure the persons and the dwellings of persons living in the vicinity, is a nuisance; and, therefore, if the jury believe from the evidence that the defendant corporation maintained at the time mentioned in the complaint, at the town, or village, or place called Melrose, a magazine, and kept stored therein large quantities of gunpowder, which, in case of explosion, was liable to injure the persons, dwellings, or other property of the residents of the said town, or village, or place called Melrose, your verdict should be for the plaintiffs. Although the jury may believe from the evidence that powder in the magazine in question was exploded by an agency beyond the control of the defendant corporation, still this would not exempt the defendant corporation from liability, provided the jury believe from the evidence that said magazine was maintained by such defendant corporation in such a place that, in case of an explosion, it was liable to injure, damage or destroy the persons or property of persons, living in the vicinity. . . . The fact, if it be a fact, that defendant's magazine and factory were located and built at Melrose before plaintiffs' house was built, has no bearing on this case. Such circumstances can in no way excuse the maintenance of a nuisance, and the question of whether the magazine and factory of the defendant was a nuisance must be solved without any reference to the location of defendant's factory and magazine." The court also either refused defendant's instructions or modified them on the line of the foregoing.

Although the complaint alleges that the damage was caused "by reason of the negligence and carelessness of the defendant," there is not a particle of evidence to support such allegation, and that theory of the action seems to have been abandoned by the plaintiff during the trial. Under the instructions of the court there were no facts for the jury to consider, for the reason that there was no question but that powder was stored in a magazine or place where, in case of explosion, it would be liable to injure or damage persons or property. The doctrine laid down by the court in the instructions, in substance, declared the business of the defendant, under the circumstances, a nuisance *per se*, and made it an insurer against all damage arising from whatever cause.

It will be observed in this case the plant in question was not devoted to the manufacture of explosives. The only risk attendant upon the business was that risk inseparable from any hand-

ling or storing of powder—the same risks that accompany its transportation, sale, use, and application in all the various circumstances in which it is availed of. By the court's instructions there is no distinction between a case of the use and manufacture of this explosive, nor any exception to the rule in a case where a secluded situation is sought in the first instance, and thereafter others are attracted to the locality, perhaps by the very fact of the business of the factory; and by such instruction the defendant is made liable, notwithstanding that the greatest care and prudence may be used in the transaction of the business, and that the explosion or damage is caused by some agent entirely beyond the control of one conducting the business. This is not the law. In *Judson v. Giant Powder Co.*, 107 Cal. 549, the damages for which the action was brought were occasioned by an explosion of nitroglycerine in process of manufacture into dynamite in the defendant's powder factory. In that case the judgment for plaintiff was sustained by this court on the ground that the damage resulted from negligence, the court holding that, the explosion having been shown, it was for the company to show by evidence that it was not the result of negligence or carelessness on its part, which it failed to do. Quoting from Shearman and Redfield on Negligence (sec. 60): "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, by the defendant, that the accident arose from a want of care." The court continuing, says: "This case seems to clearly come within the provisions of the rule there declared. There is nothing to distinguish it in principle from the army of cases that have been held to come directly within its provisions. Appellant was engaged in the manufacture of dynamite. In the ordinary course of things, an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur; *ergo*, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care." Respondent relies upon *Cheatham v. Shearon*, 1 Swan. 213, in support of his theory that the business in question here was a nuisance *per se*. In *Dumesnil v. Dupont*, 18 B. Mon. 800, the supreme court of Kentucky says that the only adjudged case met with in which the principle that a powder magazine is a nuisance *per se* seems to have been directly settled, is that of *Cheatham v. Shearon*, and adds that "the principles and reasoning on which the decision rests are opposed to the unbroken current of modern authority, English and American, upon this subject."

In *Kinny v. Koopman,* 116 Ala. 310, it is said: "The storing or keeping of gunpowder or dynamite in large quantities near the dwelling-houses of citizens in a thickly settled portion of the town, and near a certain public street in said city, is not a nuisance *per se;* and to constitute such a nuisance there must be negligence or want of due care in storing and keeping it." And in the same case it is said: "After a most careful examination of the common-law text-books and decisions, we have no doubt of the correctness of our conclusion in the foregoing cases, and which exactly accord with the law as declared in *People v. Sands,* 1 Johns. 78. Steam-power, gas, electricity, dynamite and gunpowder are in daily use, and have become indispensable to the convenience of the public and for the public defense. Invention of man and advancement in science have enabled the manufacturer of, or dealer in, these articles to provide the public or the individual with almost, if not altogether, absolute protection against danger or hurt from explosion. And even had the manufacturing and storage of gunpowder, in its early history, been a nuisance at common law, the common-law definition of a nuisance would not include gunpowder at this day." In *Tuckachinsky v. Lehigh etc. Co.,* 199 Pa. 515, a similar case was considered. In that case, at the time of the accident, the defendant had four and a half boxes of dynamite and four and a half kegs of black powder in a wooden building fourteen feet square and twelve feet high, in an open space near the shaft of its colliery. The mine was not in operation at the time, but some deadwork was being done, in which powder was necessary. The plaintiff was standing in the doorway of her father's house, and was thrown backwards down a flight of stairs by the concussion of the air, receiving injuries for which damages were sought. The explosion was caused by lightning.

The trial court in its instructions to the jury stated that there was no evidence in the case of any "negligence on the part of the defendant, unless it consisted in having the kind and quantity of explosives in the place at the time, for the purpose, and under the circumstances already stated. As to this there is no controversy, no dispute, no question of fact to be determined. The only question to be decided is whether under the law this state of facts constitutes negligence in itself for which the plaintiff may recover in this action." And the court instructed the jury to return a verdict in favor of the defendant. On appeal the supreme court says: "A nuisance has been defined as 'that which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically un-

comfortable for him.' The evidence in this case shows that the powder magazine had been in use by the defendant company for more than thirty years, and that plaintiff has resided within about seven hundred feet of it for some sixteen years. Yet there is no testimony to show that any apprehension of danger or any fear of explosion was felt or expressed by any one during that time. No objection to the location or maintenance of the magazine has been shown. The explosives were stored in small quantities to meet current needs. Such materials are always dangerous, but as their use is essential to the work of mining, it is impossible to protect absolutely persons or property in the immediate vicinity. The risk is similar to that arising from the operation of steam-boilers and other machinery and apparatus necessary to the prosperity of great communities. Negligence in the care or in the management of the magazine was neither charged nor proven. The only question in the case was as to whether or not the magazine was in itself a nuisance. We can see nothing in the evidence to support such a finding. The explosives were kept only for use in the mine, and were kept in small quantities. The explosion was caused by no act of the defendant, but by a stroke of lightning. The trial court could not have sustained a verdict for the plaintiff upon the evidence. Its instructions to the jury, found in favor of the defendant, were proper, and the judgment is affirmed." As said in the foregoing opinion, powder, gas, steam, etc., are equally dangerous, but equally necessary in the present condition of society, and the rule laid down in the above opinion seems to be well settled, not only in Pennsylvania, but in New York and elsewhere. (12 Am. & Eng. Ency. of Law, 2d ed., p. 514; *Schmeer v. Syracuse Gaslight Co.*, 147 N. Y. 529.) Another case relied upon by the respondent is *Heeg v. Licht*, 80 N. Y. 579. In a later case (*Lounsbury v. Foss*, 80 Hun. 296, 30 N. Y. Suppl. 89), speaking of *Heeg v. Licht*, the court says: "Keeping of such material does not, however, necessarily constitute a nuisance *per se;* that depends upon the locality, the quantity, and the surrounding circumstances. The consequential result of the authorities is, that each case like this must be left to the jury, under proper instructions from the court."

It does not appear that when the defendant commenced its business it was not located in a proper place, and at that time sufficiently removed from a residence district or neighborhood. It was carried on with the utmost care. The damage in question resulted from a cause entirely beyond its control, and without any carelessness or negligence on its part whatever, and

under the more recent and better line of authorities, as shown under such circumstances, it is not responsible.

The judgment and order are reversed.

SHAW, J., ANGELLOTTI, J., MCFARLAND, J., and LORIGAN, J., concurred.

BEATTY, C. J., dissented.

Rehearing denied.

WHITTEMORE v. BAXTER LAUNDRY CO.

SUPREME COURT OF MICHIGAN. 1914.

[181 *Michigan Reports* 564.]

KUHN, J. The defendant is the owner of a laundry and dry-cleaning establishment in the city of Grand Rapids, occupying the easterly portion of a block bounded on the north by Hawthorne Street, on the east by Eastern Avenue, on the south by Fountain Street, and on the west by Grand Avenue. The complainants are owners of property, and reside, in the westerly portion of the block. With the exception of defendant's plant, the location is strictly a residence district, and the complainant Arthur W. Whittemore owns and occupies a house and lot immediately adjoining defendant's premises on the west, and the defendant's property is practically surrounded by residences costing from $3,500 to $4,500 each. In its business of dry cleaning the defendant uses about 15,000 gallons of gasoline annually, and, just previous to the filing of the bill in this case, the defendant had placed in its yards two large steel tanks of the capacity of 10,000 gallons each, and had commenced excavating preparatory to burying them in the northwest corner of its premises, which was the farthest possible point on its premises from its own buildings and immediately adjoining the property of the complainant Whittemore, the nearest tank being about 11 feet from his house. The bill of complaint filed asked for a temporary injunction restraining defendant from storing gasoline in the tanks, for the reason that such storage, under the circumstances of this case, would be a private nuisance, and also that it would be in violation of certain ordinances of the city of Grand Rapids. When the bill was filed an injunction was issued restraining the defendant from storing gasoline in the tanks, which was made permanent when the case was heard on its merits.

In *Heeg v. Licht*, 80 N. Y. 579, 582 (36 Am. Rep. 654), the court, speaking of private nuisances, said:

"A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of an-

other. 3 Bl. Com., 216. Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use. Wood's Law of Nuis., Sec. 1, and authorities cited. The cases which are regarded as private nuisances are numerous, and the books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that, while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor or of his neighbors, even in the pursuit of a lawful trade. *Aldred's Case,* 9 Coke, 58; *Brady v. Weeks,* 3 Barb. (N. Y.) 159; *Dubois v. Budlong,* 15 Abb. Prac. (N. Y.) 445; *Wier's Appeal,* 74 Pa. 230."

We may grant that the storage of gasoline on premises adjacent to or adjoining the premises of another is not a private nuisance *per se.* It might, however, become such, considering the locality, the quantity, and the surrounding circumstances, and would not necessarily depend upon the degree of care used in its storage. *Heeg v. Licht, supra;* 29 Cyc. 1177. We may also concede that in the instant case every precaution that human ingenuity has conceived has been made use of in the construction of the tanks as testified to by defendant's experts. Considering, however, the dangerous character of the substance and its power as an explosive, of which in this age of its wonderful development as a power to propel automobiles, traction engines, and airships, we can well take judicial notice, and also considering human fallibility, that accidents in the operation of the most perfect mechanism will occur, and all that it needs to change what is, when properly protected, a harmless agency to a most dangerous explosive is a careless person, can it be said that to have 20,000 gallons of such an agency stored within but a few feet of one's dwelling house is not sufficient to be an unreasonable interference with the comfortable enjoyment of that home? This is a purely residence district of the city, and was such before the defendant began operating its dry-cleaning business, and it must be apparent to any fair-minded person that the location of these tanks in such immediate proximity to complainant Whittemore's house would necessarily damage his property. It also appears that tanks for storage purposes could have been placed on the Fountain Street side of defendant's property, which would have removed them from proximity to any residence. The reason for not doing this is thus stated in defendant's brief:

"Complainants called attention to the fact that there was room enough to place them on the Fountain Street side of the property. A good and sufficient reason for not placing them there is that this ground is devoted to lawn and shrubbery, upon which the company has spent considerable money, and for which it took the prize in the contest for the best-appearing manufacturing grounds."

If defendant was desirous of installing tanks to more economically conduct its business, it would seem to have been more reasonable to have disturbed and damaged its own lawn and shrubbery, however beautiful, rather than to disturb its neighbor in the enjoyment of his home and to damage his property.

Considering all the surrounding circumstances in this case, we are satisfied that the chancellor who heard the case reached a proper and equitable conclusion in determining that the storage of gasoline in the tanks was a private nuisance. In view of this conclusion, it will be unnecessary to review the ordinances of the city of Grand Rapids and determine whether the construction of these tanks and the storage of gasoline therein in the manner alleged in the bill of complaint is in violation thereof.

The decree of the court below is affirmed.

SAWYER v. DAVIS.

SUPREME COURT OF MASSACHUSETTS. 1884.

[136 *Massachusetts Reports* 239.]

Bill of Review, alleging the following facts:

The plaintiffs, who were manufacturers in Plymouth, were restrained by a decree of this court, made on October 1, 1881, upon a bill in equity brought by the present defendants, from ringing a bell on their mill before the hour of six and one half o'clock in the morning; which decree was affirmed by the full court on September 7, 1882. (See *Davis v. Sawyer,* 133 Mass. 289.) On March 28, 1883, the Legislature passed an act, which took effect upon its passage, as follows: "Manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weight, in such manner and at such hours as the board of aldermen of cities and the selectmen of towns may in writing designate." (St. 1883, c. 84.) On April 18, 1883, the selectmen of Plymouth granted to the plaintiffs a written license to ring the bell on their mill in such manner, and at such hours, beginning at five o'clock in the morning, as they were accustomed to do prior to the injunction of this court.

The prayer of the bill was that the injunction might be dis-

solved, or that the decree might be so modified as to enable the plaintiffs to act under their license without violating the decree of this court; and for other and further relief.

The defendants demurred to the bill, assigning, among other grounds of demurrer, that the St. of 1883, c. 84, was unconstitutional, so far as applicable to the defendants.

Hearing on bill and demurrer, before COLBURN, J., who reserved the case for the consideration of the full court.

C. G. Davis for the defendants.

F. D. Allen, for the plaintiffs.

C. ALLEN, J. Nothing is better established than the power of the Legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. *Bancroft v. Cambridge,* 126 Mass. 438, 441. In most instances, the illustrations of the proper exercise of this power are found in rules and regulations restraining the use of property by the owner, in such manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to a like limitation; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with, until it becomes a question how the right which each person has of prosecuting his lawful business in a reasonable and proper manner shall be made consistent with the other right which each person has to be free from unreasonable disturbance in the enjoyment of his property. *Merrifield v. Worcester,* 110 Mass. 216, 219. In this conflict of rights, police regulations by the Legislature find a proper office in determining how far and under what circumstances the individual must yield with a view to the general good. For example, if, in a neighborhood thickly occupied by dwelling-houses, any one, for his own entertainment or the gratification of a whim, were to cause bells to be rung and steam-whistles to be blown to the extent that is usual with the bells and steam-whistles of locomotive engines near railroad stations in large cities, there can be no doubt that it would be an infringement of the rights of the residents, for which they could find ample remedy and vindication in the courts. But if the Legislature, with a view to the safety of life, provides that bells shall be rung and whistles sounded, under those circumstances, persons living near by must neces-

sarily submit to some annoyance from this source, which otherwise they would have a right to be relieved from.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful and necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety as in the case of railroads, or to the necessary or convenient operation and management of their own works; and ordinarily such determination is binding on the courts, as well as upon citizens generally. And when the Legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the Legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. *Bancroft v. Cambridge,* 126 Mass. 441. It is accordingly held in many cases, and is now a well-established rule of law, at least in this Commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the Legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form. The legislative sanction makes the business lawful, and defines what must be accepted as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law. *Presbrey v. Old Colony & Newport Railway,* 103 Mass. 1, 6, 7. *Walker v. Old Colony & Newport Railway,* 103 Mass. 10, 14. *Bancroft v. Cambridge,* 126 Mass. 441. *Call v. Allen,* 1 Allen, 137. *Commonwealth v. Rumford Chemical Works,* 16 Gray, 231, 233. *Struthers v. Dunkirk, Warren & Pittsburgh Railway,* 87 Penn. St. 282. *Hatch v. Vermont Central Railroad,* 28 Vt. 142, 147. *Brand v. Hammersmith & City Railway,* L. R. 1 Q. B. 130; 2 Q. B. 223; 4 H. L. 171. *Vaughan v. Taff Vale Railway,* 5 H. & N. 679, 685, 687. *Rex v. Pease,* 4 B. & Ad. 30. Sedgw. St. & Const. Law, 435, 436.

The recent case of *Baltimore & Potomac Railroad v. Fifth Baptist Church,* 108 U. S. 317, is strongly relied on by the defendants as an authority in their favor. There are, however,

two material and decisive grounds of distinction between that case and this. There the railroad company had only a general legislative authority to construct works necessary and expedient for the proper completion and maintenance of its railroad, under which authority it assumed to build an engine-house and machine-shop close by an existing church, and it was held that it was never intended to grant a license to select that particular place for such works, to the nuisance of the church. Moreover, in that case, the disturbance was so great as not only to render the church uncomfortable, but almost unendurable as a place of worship, and it virtually deprived the owners of the use and enjoyment of their property. We do not understand that it was intended to lay down, as a general rule applicable to all cases of comparatively slight though real annoyance, naturally and necessarily resulting in a greater or less degree to all owners of property in the neighborhood from a use of property or a method of carrying on a lawful business which clearly falls within the terms and spirit of a legislative sanction, that such sanction will not affect the claim of such an owner to relief; but rather that the court expressly waived the expression of an opinion upon the point.

In this Commonwealth, as well as in several of the United States and in England, the cases already cited show that the question is settled by authority, and we remain satisfied with the reasons upon which the doctrine was here established. Courts are compelled to recognize the distinction between such serious disturbances as existed in the case referred to, and comparatively slight ones, which differ in degree only, and not in kind, from those suffered by others in the same vicinity. Slight infractions of the natural rights of the individual may be sanctioned by the Legislature under the proper exercise of the police power, with a view to the general good. Grave ones will fall within the constitutional limitation that the Legislature is only authorized to pass reasonable laws. The line of distinction cannot be so laid down as to furnish a rule for the settlement of all cases in advance. The difficulty of marking the boundaries of this legislative power, or of prescribing limits to its exercise, was declared in *Commonwealth v. Alger,* 7 Cush. 53, 85, and is universally recognized. Courts, however, must determine the rights of parties in particular cases as they arise; always recognizing that the ownership of property does not of itself imply the right to use or enjoy it in every possible manner, without regard to corresponding rights of others as to the use and enjoyment of their property; and also that the rules of the common law, which have from time to time been established, de-

claring or limiting such rights of use and enjoyment, may themselves be changed as occasion may require. *Munn v. Illinois,* 94 U. S. 113, 134.

In the case before us, looking at it for the present without regard to the decree of this court in the former case between these parties, we find nothing in the facts set forth which show that the statute relied on as authorizing the plaintiffs to ring their bell (St. 1883, c. 84) should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the Legislature to be convenient, if not necessary, for the purpose of giving notice, by ringing bells, and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers. In character, it is not unlike numerous other instances to be found in our statutes, where the Legislature has itself fixed, or has authorized municipal or other boards or officers to fix, the places, times, and methods in which occupations may be carried on, or acts done, which would naturally be attended with annoyance to individuals. The example of bells and whistles on locomotive engines has already been mentioned. Reference may also be made to the statutes regulating the use of stationary steam-engines, the places and manner of manufacturing or keeping petroleum, of carrying on other offensive trades and occupations, of storing gunpowder, and of establishing hospitals, stables and bowling-alleys.

The defendants, however, contend that a different question arises in the present case, where the plaintiffs rely upon a legislative sanction given to acts after it had been determined by this court that the doing of them was attended with a peculiar injury to the defendants, which entitled them to a remedy as for a nuisance. There can be no doubt that such sanction would be a good defense to an indictment for a nuisance; or to a proceeding instituted by an individual, whose only grievance was that he had sustained special damage in consequence of being disturbed in the enjoyment of some public right, such as a right to travel upon a highway or river. His public right may clearly be regulated and controlled by the Legislature, after a decision by the court as well as before. *Commonwealth v. Essex Co.* 13 Gray, 239, 247. But the argument is urged upon us with great force, that in the present case there had been a judicial determination that the ringing of the bell, at the hours now authorized by the terms of the statute and the designation of the selectmen, was a private nuisance to the defendants, not growing out of any public right, and that the statute ought not, as a

matter of construction, to be held applicable to this case; or, if such is its necessary construction, that it is unconstitutional, as interfering with their vested rights.

In the first place, we can have no doubt that the statute by its just construction is in its terms applicable to the present case. It is undoubtedly true that neither a general authority nor a particular license is to be so construed as to be held to sanction what was not intended to be sanctioned. A general authority is not necessarily to be treated as a particular license; *Commonwealth v. Kidder,* 107 Mass. 188; and in some cases, even where a particular license or authority has been given, as to keep an inn, alehouse, or slaughter-house in a particular place, which is specified, this authority has not been deemed to sanction the keeping of it in an improper manner. *Rex v. Cross,* 2 C. & P. 483. *Commonwealth v. McDonough,* 13 Allen, 581, 584. *State v. Mullikin,* 8 Blackf. 260. *United States v. Elder,* 4 Cranch, C. C. 507. And, ordinarily, a statute which authorizes a thing to be done, which can be done without creating a nuisance, will not be deemed to authorize a nuisance. In such case, it is not to be assumed that it was contemplated by the Legislature that what was so authorized would have the necessary effect to create a nuisance, or that it would be done in such a manner as to create a nuisance; and, if a nuisance is created, there will in such cases ordinarily be a remedy at law or in equity. *Eames v. New England Worsted Co.,* 11 Met. 570. *Haskell v. New Bedford,* 108 Mass. 208, 215. *Commonwealth v. Kidder,* 107 Mass. 188. But, on the other hand, the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act. When the Legislature authorized factory bells to be rung, it must have been contemplated that they would be heard in the neighborhood. That is a natural and inevitable consequence. The Legislature must be deemed to have determined that the benefit is greater than the injury and annoyance; and to have intended to enact that the public must submit to the disturbance, for the sake of the greater advantage that would result from this method of carrying on the business of manufacturing. It must be considered, therefore, in this case, that a legislative sanction has been given to the very act which this court found to create a private nuisance.

It is then argued that the Legislature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court; and this is undoubtedly true, so far as such rights have become vested.

For example, if the plaintiff under an existing rule of law has a right of action to recover damages, for a past injury suffered by him, his remedy cannot be cut off by an act of the Legislature. So also, if, in a suit in equity to restrain the continuance of a nuisance, damages have been awarded to him, or costs of suit, he would have an undoubted right to recover them, notwithstanding the statute. But, on the other hand, the Legislature may define what in the future shall constitute a nuisance, such as will entitle a person injured thereby to a legal or equitable remedy, and may change the existing common-law rule upon the subject. It may declare for the future, in what manner a man may use his property or carry on a lawful business without being liable to an action in consequence thereof; that is, it may define what shall be a lawful and reasonable mode of conduct. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of which the court is the final judge; but, within this limitation, the exercise of the police power of the Legislature will apply to all within the scope of its terms and spirit. The fact that the rights of citizens, as previously existing, are changed, is a result which always happens; it is indeed in order to change those rights that the police power is exercised. So far as regards the rights of parties accruing after the date of the statute, they are to be governed by the statute; their rights existing prior to that date are not affected by it. To illustrate this view, let it be supposed that the case between the present parties in its original stage had been determined in favor of the manufacturers, under which decision they would have had a right to ring their bell; and that afterwards a statute had been passed providing that manufacturers should not ring bells except at such hours as might be approved by the selectmen; and that these manufacturers had then proceeded to ring their bell at other hours, not included in such approval. It certainly could not be said that they had a vested right to do so, under the decision of the court.

The injunction which was awarded by the court, upon the facts which appeared at the hearing, did not imply a vested right in the present defendants to have it continued permanently. Though a final determination of the case before the court, and though binding and imperative upon the present plaintiffs, and enforceable against them by all the powers vested in a court of equity, yet they were at liberty at any time, under new circumstances making it inequitable for it to be longer continued, to apply to the court for a review of the case and a dissolution of

the injunction. In respect to such a state of facts, an injunction can never be said to be final, in the sense that it is absolute for all time. Even without any new legislation affecting the rights of the parties, with an increase of their own business and a general increase of manufacturing and other business in the vicinity, and of a general and pervading change in the character of the neighborhood, it might be very unreasonable to continue an injunction which it was in the first instance entirely reasonable and proper to grant. The ears of the court could not under such new circumstances be absolutely shut to an application for its modification, without any new statute declaring the policy of the Commonwealth in respect to any branch of business or employment. But a declaration by the Legislature that, in its judgment, it is reasonable and necessary for certain branches of business to be carried on in particular ways, notwithstanding the incidental disturbance and annoyance to citizens, is certainly a change of circumstances which is entitled to the highest consideration of the court; and in the present case we cannot doubt that it is sufficient to entitle the plaintiffs to relief from the operation of the injunction.

The method of procedure to which the plaintiffs have resorted is the usual and proper one in such circumstances. 2 Dan. Ch. Pl. & Pr. (4th Am. ed.) 1577, note 3. Story Eq. Pl., Secs. 404 *et seq.* *Clapp v. Thaxter,* 7 Gray, 384. And, for authorities tending to show that the plaintiffs are entitled to the relief which they seek, in consequence of a subsequent statute changing the rights of the parties, see *Pennsylvania v. Wheeling & Belmont Bridge,* 18 How. 421; *The Clinton Bridge,* 10 Wall. 454, 463; *Gilman v. Philadelphia,* 3 Wall. 713, 732; *South Carolina v. Georgia,* 93 U. S. 4, 12; *Bridge Co. v. United States,* 105 U. S. 470, 480; *Commonwealth v. Old Colony & Fall River Railroad,* 14 Gray, 93, 97; *Bartholomew v. Harwinton,* 33 Conn. 408.

Demurrer overruled.

ELLIOTSON v. FEETHAM.

COURT OF COMMON PLEAS. 1835.

[2 *Bingham's New Cases* 134.]

The declaration stated, that the plaintiff before and at the time of committing the grievance therein-after mentioned, was, and from thence hitherto had been, and still was lawfully possessed (for the rest and residue of a certain term, whereof eleven years and upwards were yet to come and unexpired,) of a

certain messuage or dwelling-house, with the appurtenances, situate in the parish of St. George, Hanover Square, in the county of Middlesex, in which said messuage or dwelling-house with the appurtenances, the plaintiff and his family during all the time aforesaid inhabited and dwelt; and that the plaintiff had for and during all the time aforesaid used, exercised, and carried on, and still did exercise and carry on the profession of doctor of medicine and physician at and in the said messuage or dwelling-house. That the defendants before and at the time of committing the said grievance, and from thence hitherto, were possessed of certain workshops, and of a certain manufactory for the working of iron, and for the making and manufacturing of ironmongery goods, situate near to the said messuage or dwelling-house, with the appurtenances of the plaintiff; nevertheless, the defendants being so possessed of the said workshops and manufactory, and well knowing the premises aforesaid, but contriving, and wrongfully and unjustly intending to injure the plaintiff, and to interrupt, disturb, disquiet, and annoy him and his family in the peaceable and quiet possession, use, occupation, and enjoyment of the said messuage or dwelling-house, with the appurtenances, and also to injure, interrupt, and disturb him in the exercise of his profession aforesaid, whilst the plaintiff was so possessed of said messuage or dwelling-house, with the appurtenances, and so inhabited and dwelt therein with his family, and whilst he so used, exercised, and carried on his said profession therein as aforesaid, to wit, on the 20th of July, 1831, and on other days and times between that day and the commencement of this suit, wrongfully and unjustly made and caused to be made in their said workshops and manufactory divers large fires, and also divers loud, heavy, jarring, varying, agitating, hammering, and battering sounds and noises, although they the defendants were on those several days and times aforesaid urged and requested to desist therefrom; by means of which said several premises, the plaintiff and his family were greatly disturbed and disquieted, incommoded, interrupted, and annoyed in the peaceable and quiet possession, use, occupation, and enjoyment of the said messuage or dwelling-house with the appurtenances; and the said messuage and premises of the plaintiff had been, and were by means of the several premises aforesaid greatly lessened in value; and also by means of the said several premises, the plaintiff for and during all the time aforesaid had been greatly disturbed, interrupted, and prevented from exercising and carrying on his said profession in so ample and beneficial a manner as he otherwise might and would have done.

Plea. That the defendants were possessed of their said workshops and manufactory in the declaration mentioned, long, to wit, for the space of ten years, before the plaintiff became possessed of his said term of and in the said messuage or dwelling-house, with the appurtenances, in the declaration mentioned; and that the defendants always, from the time at which they so became possessed of their said workshops and manufactory down to and until the plaintiff so became possessed of his messuage or dwelling-house, with the appurtenances as aforesaid, used, exercised, and carried on the said trade and business of ironmongers, and worked iron, and made and manufactured ironmongery goods in their said workshops and manufactory without any let, suit, interruption, molestation, or complaint, by or on the part of the owners or occupiers of the said messuage or dwelling-house now of the said plaintiff; and that the defendants, from the time the plaintiff so became possessed of his said messuage or dwelling-house, hitherto, had continued to use, exercise, and carry on the said trade and business of ironmongers, and to work iron, and make and manufacture ironmongery goods in their said workshops and manufactory, in the same manner as they had always, from the time of their becoming possessed of their said workshops and manufactory, down to and until the time when the said plaintiff so became possessed of his said messuage or dwelling-house, been used and accustomed to do, and without making or causing to be made in their said workshops and manufactory larger fires, or louder, heavier, more jarring, varying, or agitating, hammering, or battering sounds or noises, than the defendants had during all the previous time been accustomed to do, or than were necessary and requisite to enable them to carry on their said trade and business, in and upon their said workshops and premises, in the same manner as they had always theretofore been used and accustomed to do.

Replication. That though true it is that the defendants were possessed of their said workshops and manufactory in the declaration mentioned before the plaintiff became possessed of his said term of and in the said messuage or dwelling-house, with the appurtenances in the declaration also mentioned, nevertheless such term as aforesaid was created and granted long, to wit, for the space of four years before the said defendants were possessed of their said workshops and manufactory in the declaration mentioned; and before they used, exercised, or carried on the said trade and business of ironmongers, and worked iron, and made and manufactured ironmongery goods therein as aforesaid; and that the defendants since the plaintiff became

possessed of the said term of and in the said messuage or dwelling-house, with the appurtenances as aforesaid, to wit, on the several days and times in the declaration mentioned, committed the said several grievances therein mentioned and above complained of.

Demurrer and joinder.

Hoggins being called on to support the plea, contended that as the plaintiff by his own shewing on the replication, had come to the nuisance, he could not succeed in this action: *Leeds v. Shakerly* [Cro. Eliz. 751.]: But

THE COURT intimating that the defendants should at least have alleged a holding of twenty years' duration, judgment was given for the plaintiff, with leave, however, to the defendants to amend, upon their producing such an affidavit as should satisfy the court they had a right to plead. When the case was mentioned again, no affidavit being produced, the court directed the judgment to be entered for the plaintiff.

Judgment for the plaintiff.

BAMFORD v. TURNLEY.

COURT OF QUEEN'S BENCH. 1860.

[3 *Best and Smith's Reports* 60.]

COURT OF EXCHEQUER CHAMBER. 1862.

[3 *Best and Smith's Reports* 66.]

(This case will be found on page 64 *supra*. Read again the opinion of Baron Bramwell beginning on page 72.)

MIDDLESEX COMPANY v. McCUE.

SUPREME COURT OF MASSACHUSETTS. 1889.

[149 *Massachusetts Reports* 103.]

Bill in equity to restrain the defendant from filling the plaintiff's mill-pond, and to compel him to remove material already deposited in it. Hearing upon the pleadings and a master's report before Holmes, J., who reserved the case for the consideration of the full court, in substance as follows:

The master's report contained the following facts. The plaintiff, a mill corporation, was the owner of the mill-pond in question, which was raised by its dam, and of the land under the pond, and for thirty years and more had constantly used the water power thus created for manufacturing purposes. The defendant was the owner of land upon the side of a hill sloping down to the pond as far as the land of the plaintiff. The defendant had annually used and cultivated his land, in the ord-

inary way, to within a short distance from the plaintiff's land, for the purpose of raising garden vegetables, and had brought thereon manure and ashes, which he had dug and spaded into the soil. The defendant had erected neither a fence nor a wall to prevent the filling of the plaintiff's pond, or to prevent the raising of his own land, which the plaintiff had the right to flow, or for the purpose of banking against further flowage.

The plaintiff contended that the defendant, by cultivating the land, had changed the character of the soil, had caused it to wash into its mill-pond, and that the land could not be legally so used if it interfered with the plaintiff's rights of flowage, and caused the filling up of its mill-pond.

The master found that although in fact the cultivation of the land did cause a raising of the land near the shore of the plaintiff's pond, and a filling up of the pond, it was such a use of the land as might be legally made; and ruled that the defendant might, as he had done, cultivate his land, and apply ashes and other fertilizers in the ordinary course of husbandry.

B. F. Butler and *P. Webster,* for the plaintiff.

C. Cowley, for the defendant.

HOLMES, J. This is a bill brought to restrain the defendant from filling up the plaintiff's mill-pond. The master reports that the defendant's land is on the slope of a hill running down to the pond, and that the only acts of the defendant tending to fill the pond have been those of cultivating and manuring his own soil in the ordinary way, for the purpose of raising garden vegetables. The question is whether the defendant has a right to do these acts notwithstanding their effects upon the plaintiff's land and water rights.

The respective rights and liabilities of adjoining land owners cannot be determined in advance by a mathematical line or a general formula, certainly not by the simple test of whether the obvious and necessary consequence of a given act by one is to damage the other. The fact that the damage is foreseen, or even intended, is not decisive apart from statute. Some damage a man must put up with, however plainly his neighbor foresees it before bringing it to pass. *Rideout v. Knox,* 148 Mass. 368. Liability depends upon the nature of the act, and the kind and degree of harm done, considered in the light of expediency and usage. For certain kinds there is no liability, no matter what the extent of the harm. A man may lose half the value of his house by the obstruction of his view, and yet be without remedy. In other cases his rights depend upon the degree of the damage, or rather of its cause. He must endure a certain amount of

noise, smells, shaking, percolation, surface drainage, and so forth. If the amount is greater, he may be able to stop it, and to recover compensation. As in other matters of degree, a case which is near the line might be sent to a jury to determine what is reasonable. In a clear case it is the duty of the court to rule upon the parties' rights.

The present case presents one of those questions of degree. If the plaintiff were complaining of offensive drainage from a vault, it would be entitled to recover upon proof of the fact. *Ball v. Nye,* 99 Mass. 582. If it complained that the surface drainage was made offensive by the nature of the substance spread by the defendant upon his land, the case would be nearer the line and the right to recover possibly might depend upon further circumstances, such as whether the substances were usual and reasonable fertilizers, or refuse, etc. See *Brown v. Illius, 27* Conn. 84, and 25 Conn. 583. In this case it complains, not that the substances brought down are offensive, but that the defendant causes any solid substances to be brought down at all. Practically it would forbid the defendant to dig his land, at least without putting up a guard, since the surface drainage necessarily carries more of the soil along with it if the earth is made friable by digging. This would cut down the defendant's right of surface drainage to a very small matter indeed. We are of opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may. The plaintiff says that a wall would stop the trouble. If so, it can build one upon its own land. *Dickinson v. Worcester,* 7 Allen, 19. *Flagg v. Worcester,* 13 Gray, 601, 607. *Parks v. Newburyport,* 10 Gray, 28. *Cassidy v. Old Colony Railroad,* 141 Mass. 174.

Bill dismissed.

BOOTH v. THE ROME ETC. RAILROAD COMPANY.

COURT OF APPEALS OF NEW YORK. 1893.

[140 *New York Reports* 267.]

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 22, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries to plaintiff's house in the city of Rochester, alleged to have been caused by defendant's unlawful acts.

The principal facts upon which the question presented arises are as follows:

The defendant is a railroad corporation organized under the General Railroad Law of this state. In 1887, it owned a lot in the city of Rochester, extending from the west side of St. Paul street to the Genesee river, adjacent to a lot owned by the plaintiff on the south, purchased by her in 1885, on which was a dwelling occupied by her, fronting on St. Paul street, the north side of which was about six feet south of the north line of her lot. The defendant projected an extension of its road from a point east of St. Paul street to the Genesee river and thence across the river by a bridge. It obtained the consent of the municipal authorities to cross St. Paul street by a tunnel or cutting, and proceeded to extend its road across the street to the river. Its line crossed St. Paul street from a point on the east side of the street, opposite the lot of the defendant, striking the center of defendant's lot on the west side, and thence ran longitudinally through the lot to the bank of the river.

It became necessary, in order to comply with the conditions imposed by the city authorities, that the defendant's roadbed at the crossing should be depressed fifteen feet or more below the surface of the street. The excavation required for this purpose involved also the necessity of continuing the cutting through the lot of the defendant, so as to procure a uniform grade. The soil extended about ten feet below the surface, and underlying that was rock, which it became necessary to remove to the depth of about four feet. It was loosened by blasting with gunpowder. It was claimed by the plaintiff, and evidence was given tending to show that in consequence of the blasting the plaintiff's house was seriously injured; that the foundations were cracked, the beams and joists pulled apart, the plaster loosened, and that generally the house was wrenched and rendered insecure. It is not claimed that any rock or materials were thrown by the blasts upon the plaintiff's lot. In what particular way the injury was produced was not shown. It may be inferred that it was caused by the jarring of the ground or the concussion of the atmosphere created by the explosion, or by both causes combined. It was, however, affirmatively proven, without contradiction, that there was no disturbance of the earth on the sides of the excavation, and that gas and water pipes in the street, exposed by the excavation, were not displaced or injured.

It was substantially conceded that the defendant exercised due care in conducting the blasting, and that it was necessary in order to remove the rock. There was evidence tending to show

that the persons engaged in the work were informed from time to time during its progress that injury was being done to the plaintiff's house. The trial judge instructed the jury that the defendant in using powerful explosives in blasting the rock used them at its peril, and that if the plaintiff's house was injured thereby the defendant was liable for the damages occasioned, and "that it made no difference whether the work was done carefully or negligently." Exception was taken by the defendant to this instruction. The jury found that the damage to the house from the blasting was $1,750 and this sum was included in the verdict.

The court overruled the contention of the defendant that in constructing its road it was acting under legislative authority and was on that ground, in the absence of negligence, exempted from liability, even although as between individuals an action might be maintained.

Other facts are stated in the opinion.

* *S. M. French* for appellant.

David Hays for respondent.

ANDREWS, Ch. J. We entertain no doubt of the correctness of the ruling at the Circuit that the defendant stands in no better position in defending the action than if the controversy was between individuals.

The rule that the legislature may, in the public interest and for public purposes, authorize and legalize acts causing consequential injury to private property, not amounting to a taking, without providing compensation, and that the legislative authority may be pleaded in bar of any claim for indemnity, although if the act had been done without such authority an action would lie, has no application to acts of a railroad or other business corporation in the execution of chartered or statutory powers. The rule adverted to, although operating in some cases with great severity, which compels an individual to bear a special loss for the benefit of the community at large, in place of distributing the burden, is an application of the maxim *salus populi est suprema lex*, and rests upon the transcendant power of the legislature, within constitutional limitations, to enact whatever it may deem essential to the public welfare. But while there are decisions which give countenance to the view that an authority conferred upon a railroad corporation to construct a railroad, carries with it immunity from liability in executing the work for consequential damages to private property, to the same extent as pertains to the sovereign in executing public works (*Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42), it is now the settled doc-

* The arguments of counsel are omitted.—*Ed.*

trine in this state that the powers granted to such corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights and under the same responsibility as though the acts done in execution of such powers were done by an individual. (*Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10.) This doctrine accords with reason and with the presumed intention of the legislature. The franchises of a railroad corporation are conferred in consideration of supposed public benefits which result from the construction of its road. The projectors of such an enterprise are moved by considerations of personal advantage. To acquire corporate character and privileges they are willing to subject themselves to certain public duties. But it is quite unreasonable that in executing its corporate powers the corporation should be exempted from liability for injuries to private property, as though it was acting as a strictly public agent. There may be limited exceptions, as in cases of highway crossings, where an adjustment of the grade becomes necessary, working a consequential injury to adjacent landowners, which is remediless, and the legislative authority will also bar any remedy for certain discomforts consequent upon the necessary operation of the road, such as noise and smoke of passing trains.

We, therefore, agree with the courts below that the right of the plaintiff to recover in this case, and the liability of the defendant, depend upon the same rule as would govern the parties if both were natural persons, and the injury to the plaintiff's dwelling had resulted from blasting by an adjacent owner on his land in the course of adapting it to individual uses.

The plaintiff, upon the findings of the jury, sustained a serious injury. It is true that witnesses on the part of the defendant gave evidence tending to show that the house was imperfectly constructed, and that the foundation walls were giving way before excavation was commenced. But the verdict having been affirmed by the General Term, there can be no controversy here that the blasting caused damage to the house to the amount of the verdict. But mere proof that the house was damaged by the blasting would not alone sustain the action. It must further appear that the defendant in using explosives violated a duty owing by him to the plaintiff in respect of her property, or failed to exercise due care. Wrong and damage must concur to create a cause of action.

If the injury was occasioned by the omission to use due care, this alone would sustain the action, even if the right of the defendant to use explosives in removing the rock was conceded.

If one by carelessness in making an excavation on his own land causes injury to an adjoining building, even where the owner of the house has no easement of support, he will be liable. (*Leader v. Moxon,* 3 Wils. 460; *Lawrence v. Great Northern Railway Co.,* 16 Ad. & El. 643-653; Leake's Law of Real Prop. 248.) The law exacts from a person who undertakes to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate the injury. The defendant could not conduct the operation of blasting on its own premises, from which injury might be apprehended to the property of his neighbor, without the most cautious regard for his neighbor's rights. This would be reasonable care only under the circumstances. If it was practicable in a business sense for the defendant to have removed the rock without blasting, although at a somewhat increased cost, the defendant would, we think, in view of the situation, and especially after having been informed of the injury that was being done, have been bound to resort to some other method. There is evidence that the rock from some parts of the excavation was loosened by the use of iron bars, and if this was practicable as to all of it the jury might well have found that this means should have been adopted. So, also, if less powerful blasts might have been used, which, if used, would not have occasioned injury, or would have lessened it, the omission to use them might well be considered as negligence. The mode of exercising a legal right, where there is a choice of means, may of itself give a cause of action. The plaintiff, however, on this record is precluded from claiming that the judgment may be sustained because of negligence in the mode of blasting. It must be assumed from concessions made on the trial and from the rule of law laid down by the court, that blasting was the only mode of removing the rock practically available; that it was conducted with due care, and that it was necessary to enable the defendant to conform the roadbed to the established grade. This is a case, therefore, of unavoidable injury to the plaintiff's house, occasioned by the act of the defendant in blasting on its own premises, in order to adapt them to a lawful use, the mode adopted being the only practicable one and the work having been prosecuted with due care and without negligence. The question is, whether the act of the defendant, connected with the resulting injury, was a legal wrong for which the plaintiff has a right of action.

The general rule that no one has absolute freedom in the use of his property, but is restrained by the co-existence of equal

rights in his neighbor to the use of his property, so that each in exercising his right must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous. The maxim which embodies it is sometimes loosely interpreted as forbidding all use of his own property, which annoys or disturbs his neighbor in the enjoyment of his property. The real meaning of the rule is that one may not use his own property to the injury of any legal right of another. The cases are numerous where the lawful use of one's property causes injury to adjacent property, for which there is no remedy, because no right of the adjacent owner is invaded, although he suffers injury. The cases of excavation furnish a striking illustration. The easement of natural support of the land of one by the land of the adjacent owner, applies only to lands in their natural condition, and does not extend so as to give the owner of a building erected on the confines of his land, the right to have it supported laterally by the land of his neighbor; and so it has become the settled doctrine of the law that if one by excavating on his own land adjacent to the land of his neighbor, using due care, causes a building on his neighbor's land to topple over, there is no remedy, provided the weight of the building caused the land on which it stood to give way. There is in the case supposed, damage, but no wrong, because what was done by the adjacent owner was in the lawful and permitted use of his own property. (*Wyatt v. Harrison,* 3 B. & Ad. 871; *Partridge v. Scott,* 3 M. & W. 220; *Lasala v. Holbrook,* 4 Pai. 170; *Thurston v. Hancock,* 12 Mass. 220.)

The fundamental proposition upon which the plaintiff's counsel rests his argument in support of the recovery, is that the use of the explosives in blasting constituted, under the circumstances, a private nuisance, and that according to the general rule of law one who creates or maintains a nuisance is liable for any special injury to person or property resulting therefrom. The right of the defendant to excavate on its land for its roadbed is not challenged, but the right to use the destructive agency of gunpowder in the work of excavation, liable to produce injury, and which did occasion it, is denied. The exception is not to the thing done, but to the mode of doing it. It is to be observed, however, that under the concessions in the case and the rulings on the trial, it must be assumed that the excavation could not have been done except by the use of explosives. This mode of doing the work was, therefore, of the substance of the right, if the right existed

at all. It has been frequently said that the right of an owner of land to use his property as he likes, does not justify the maintaining of a nuisance, or the commission of a trespass, and Blackstone, after stating that where one, by smelting works on his own land, causes noxious vapors, which injure the corn or grain on his neighbor's land or damage his cattle, this would be a nuisance, proceeds to say, "that if you do any other act in itself lawful, which, yet being done in that place, necessarily tends to the damage of another's property, it is a nuisance for it is incumbent on him to find some other place to do that act where it will be less offensive." (2 Black. Com., ch. 13, p 218.) There are many illustrations in the books of the doctrine stated by the learned commentator, that the use of one's own land for the purpose of a lawful trade may become a nuisance to his neighbor. But whether a particular act done upon, or a particular use of one's own premises constitutes a violation of the obligations of vicinage, would seem to depend upon the question whether such act or use was a reasonable exercise of the right of property, having regard to time, place and circumstances. It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although it brings annoyance, discomfort or injury to his neighbor, which are *damnum absque injuria*. The case of the building caused to fall by an excavation in an adjoining lot, already referred to, is an illustration. The right of an owner of a mine to excavate the mineral in his mine, although by so doing it causes the water to collect therein and to be discharged into an adjacent mine on a lower level, thereby causing damage to the mine of such adjacent owner, is another illustration of a lawful use of property followed by damage to the property of another, for which no action lies. (*Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. [N. S.] 376; *Wilson v. Waddell*, 2 App. Cas. 95.) In referring to these cases, in *Hurdman v. North Eastern Railway Co.* (L. R. [3 C. P. Div.] 168), the court said: "The owner of lands holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural use by his neighbor of his land, and that, where an interference with his enjoyment by something in the nature of a nuisance is the cause of complaint, no action can be sustained, if this is the result of a natural use by a neighbor of his land." Whether a particular act or thing constitutes a nuisance may depend on the circumstances and surroundings. The use of premises for mechanical or other purposes, causing great noise, disturbing the peace and quiet of those living in the

vicinity and rendering life uncomfortable, or filling the air with noxious vapors, or causing vibration of the neighboring dwellings, constitute nuisances, and such use is not justified by the right of property. (*Fish v. Dodge*, 4 Den. 311; *McKeon v. See*, 51 N. Y. 300; *Cogswell v. R. R. Co., supra.*) These and like cases are those where the property of the owner is appropriated to a permanent use which is a constant and serious interference with the enjoyment by other property owners of their property. But there is a manifest distinction between acts and uses which are permanent and continuous and temporary acts which are resorted to in the course of adapting premises to some lawful use. For example, the erection of an iron building adjacent to a dwelling might, for the time being, cause as much noise and discomfort as would arise from conducting the business of finishing steam boilers on adjacent premises, but this would not constitute a nuisance, and the owner of the dwelling would have no remedy. The streets may be obstructed temporarily, subject to municipal regulations, for the deposit of building materials, and the party would not be chargeable with maintaining a nuisance. The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.

The rule announced by the trial judge, that the use, by an owner of property, of explosives in excavating his land, is at his peril and imposes liability for any injury caused thereby to adjacent property irrespective of negligence, is far reaching. It would constitute, if sustained, a serious restriction upon the use of property, and in many cases greatly impair its value. The situation in the city of New York furnishes an apt illustration. The rocky surface of the upper part of Manhattan Island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing when he comes to build on his lot adjoining, on the ground that by so doing his structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent

or tend to prevent the improvement of property. The first occupant in building on his lot exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal right in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there. (*Platt v. Johnson,* 15 Jo. 213; *Thurston v. Hancock, supra; Tipping v. St. Helen's Smelting Co.,* L. R. [1 Ch. App.] 66; *Campbell v. Seaman,* 63 N. Y. 568.) The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling, but it cannot, we think, exclude the former from employing the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor.

We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hay v. Cohoes Co.* (2 N. Y. 159), that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This the court held could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. The case of *Benner v. Atlantic Dredging Co.* (134 N. Y. 156), was the case of an injury to the plaintiff's house, resulting from the jarring caused by the blasting of rocks in Hell Gate, and it was held that the injury was remediless, for the reason that the defendant was acting under the authority of the government of the United States by virtue of a contract authorized by congress. It has been held that the keeping of gunpowder in large quantities near inhabited dwellings is a nuisance, and in the case of explosion subjects the party keeping it to liability for damages occasioned thereby. (*Myers v. Malcolm,* 6 Hill, 292; *Heeg v. Licht,* 80 N. Y. 579.) So also it has been held that the working of quarries by the use of gunpowder, to the injury of property in the vicinity, gives a right of action. (*City of Tiffin v. McCormack,* 34 Ohio St. 638; *Scott v. Bay,* 3 Md. 431.)

Many of the cases cited by counsel are cases of the permanent appropriation of property for dangerous or noxious uses causing damage. The distinction between such cases and those where the injury arises from acts done in the necessary adjustment of property for a lawful use by means necessary and not unusual, but involving damage to adjacent property, has been adverted to. We recognize the difficulty of formulating a general rule regulating the rights of adjacent landowners in the use of their property, and we realize how narrow the margin is which separates this from some decided cases. In *Marvin v. Brewster Iron Co.* (55 N. Y. 557), the opinion of the learned judge who wrote in that case sustains the conclusion we have reached in this case. But the point was not necessarily involved, since it was held that the defendant there had acquired by grant the right to employ blasting in removing the mineral, and that the plaintiff, a subsequent grantee of the surface, could not complain of injury to his house therefrom in the absence of negligence on the part of the defendant in conducting the work. Judge Folger in that case said: "Whatever it is necessary for him (defendant) to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no ill effect to the adjacent surface in its natural state, that he may do though it harm erections lately put there." If the learned judge intended to lay down the rule that the owner of land may do anything on his own land which would do no injury to the adjacent property if it had remained in its natural state, the proposition is probably too broad. One may do in a barren waste things which he could not lawfully do in or near an inhabited town.

But the defendant here was engaged in a lawful act. It was done on its own land to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land, but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The lot of the defendant could not be used for its roadbed until it was excavated and graded. It was to be devoted to a common use, that is, to a business use. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think the plaintiff has no legal ground of complaint. The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure. The rule governing the rights of adjacent landowners in the use

of their property, seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live. To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think the law does not exact. Public policy is promoted by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this. The law is interested also in the preservation of property and property rights from injury. Will it in this case protect the plaintiff's house by depriving the defendant of his right to adapt his property to a lawful use, through means necessary, usual and generally harmless? We think not.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

*Judgment reversed.**

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* *Accord: MacGinnis v. Marlborough-Hudson Gas Company* (1915) 220 Mass. 575; *Benner v. Atlantic Dredging Co.* (1892) 134 N. Y. 156; *Holland House Co. v. Baird* (1901) 169 N. Y. 136; *Simon v. Henry* (1898) 62 N. J. Law. 486.

Contra: *Colton v. Onderdonk* (1886) 69 Cal. 155; *The Fitz Simons and Connell Co. v. Braun and Fitts* (1902) 199 Ill. 390; *Watson v. Mississippi River Power Co.* (Iowa 1916) 156 N. W. 188; *Longtin v. Persell* (1904) 30 Montana 306; *Louden v. City of Cincinnati* (1914) 90 Ohio State 144; *Hickey v. McCabe* (1910) 30 R. I. 346; *Gossett v. Southern Railway Co.* (1905) 115 Tenn. 378; *Patrick v. Smith* (1913) 75 Wash. 407.

In *Colton v. Onderdonk, supra,* the court says:

"The fact that the defendant used quantities of gunpowder, a violent and dangerous explosive, to blast out rocks upon his own lot, contiguous to another person's situate in a large city, must be taken as an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling-house as the natural and proximate result of his blasting. For an act which in many cases is in itself lawful becomes unlawful when by it damage has accrued to the property of another.

"And it would make no material difference whether that damage resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling-house or a concussion of the air around it, which had either damaged or entirely destroyed it.

"The defendant seems by his contention to claim that he had a right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken."

RODENHAUSEN v. CRAVEN.

SUPREME COURT OF PENNSYLVANIA. 1891.

[141 *Pennsylvania Reports* 546.]

On May 1, 1889, William Rodenhausen filed a bill in equity against Jerome Craven and George F. Craven, charging the defendants with the maintenance of a nuisance; praying for an injunction. Issue having been joined, the cause was referred to Mr. W. H. Shoemaker, as examiner and master.

At the hearing before the master, it was shown that the plaintiff was the owner of the property No. 1445 Franklin street, purchased in 1885 and occupied by himself and family as a dwelling thenceforward; that Franklin street, in the neighborhood of said property, was occupied on both sides chiefly by private residences of people in comfortable circumstances; that in 1885 the defendants commenced the business of carpet-cleaning in a three-story building upon the lot adjoining that of the plaintiff; that the building of defendants was separated from that of the plaintiff by a party wall thirteen inches thick to the second floor, and nine inches above that to the roof; that the defendants made use of the front part of their first floor as a place to store their wagons, and in the rear kept their horses, from three to five in number; on the second floor was the machinery for cleaning carpets from dust and dirt, and the carpets were steamed in the third floor by the use of a noisy jet of steam escaping from a flexible pipe. There was testimony showing the noise and stench coming from the defendants' stable, the noise and vibrations and dust proceeding from the cleaning of carpets on the second floor, and the noise from the escaping steam on the third floor. Among other witnesses, the plaintiff's wife testified as follows:

"The dust stack is right back of my bedroom windows, second story; the dust comes out there, sifts through the bottom of the box, and our window sill is just packed full of dirt. I am annoyed very much. It comes through our windows, closed or not, very often. It's only about a week ago I was sweeping the parlor, when the dust came right in,—it just runs and comes down with volumes of dirt; it flies about when they are cleaning the carpet, comes out like smoke—just like fire, both front and back. I have to keep both of my windows closed . . . The moths are terrible; I never saw anything so terrible; everything is eaten up by the moths. I had to take all my carpets up this fall, and they had not been laid a year; they were new carpets, but on account of the moths I had to take them up . . . It goes

out the front of Cravens' just as bad as it does in the back, if not worse; it pours out. It comes out front because they have the doors open——a big sliding door that is open; when they open the machine to examine the carpet, there is a slapping, and while they are doing that, the dust seems to sift through the house each side. . . . If I don't get it front, I get it back. You can see it coming out of the stack; sprinkles down like little fine rain." *

PER CURIAM: The evidence fully justified the finding of the master that defendants' stable and carpet-cleaning establishment were nuisances. While such establishments are not necessarily nuisances, or nuisances *per se*, they may become so by reason of their location, and the manner in which the business is conducted. It is necessary to have carpets cleaned, and this involves a place where such work may be done; but care should be exercised to locate such establishments where they will cause the least annoyance to others. In this case, the defendants selected a neighborhood devoted to private residences, and immediately adjoining the complainant's house. The natural result followed, and his home was rendered uncomfortable by the dust and moths from the carpets in the process of cleaning. This was not an imaginary grievance; it was a reality; a nuisance of a very serious character. Nor was the stable less so, by reason of its location. The appellants might have avoided this difficulty by selecting a different neighborhood for their operations.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

GILBERT v. SHOWERMAN.

SUPREME COURT OF MICHIGAN. 1871.

[23 *Michigan Reports* 448.]

COOLEY, J. This is a bill to enjoin a private nuisance.

The complainant is owner of a city lot in the city of Detroit covered by a four-story brick building, fronting on the south side of Jefferson avenue and extending to Woodbridge Street. The lower story of the building he has been accustomed to rent as a store or warehouse, while the upper stories are occupied by him, with his family, as a dwelling-house, and the roof as a convenient place for drying clothes. His ownership has continued for twenty years or more. Adjoining his building, on the east, is another four-story brick building, and he avers that the defendants, being in possession thereof, have set up therein a steam engine and boiler, and put in other machinery and fixtures,

* The report of the master is omitted.—*Ed.*

and fitted the same up as a steam flouring-mill, and are running, and threaten to continue to run the said mill with the power of said steam-engine and boiler, and to use the said building with the machinery therein as such mill. He further avers that the use of such building, as a mill, causes great injury, inconvenience and damage to complainant in the occupation and use of his said building, and endangers the safety of the building itself; that the motion of the machinery, in running said mill, shakes complainant's building, weakening the walls thereof and permanently damaging the same, and creates a rumbling noise and a trembling motion that causes the doors, windows, crockery and any other fixtures or articles that are loose in complainant's dwelling-house to rattle continuously; that the fires of said boiler and steam-engine generate quantities of soot and cinders, which are thrown out therefrom on the roof of complainant's said dwelling-house, and that the steam is thrown out from said boiler and engine, through the exhaust pipes, and condenses and falls thereon, keeping the same, and the air above it, foul and damp, and that flour collects about said mill, from the use thereof, and turns musty and sour, and poisons the air in, and about, complainant's said building. By means whereof complainant alleges that his dwelling-house is rendered uncomfortable, unhealthy, noisy and unfit for occupation, and complainant is deprived of the use of the roof thereof for the ordinary purpose of drying clothes thereon, and is hindered and prevented from renting his store and deriving gain and profit therefrom. Therefore he prays a perpetual injunction to restrain the defendants from using their said building for such steam flouring-mill, and from using or running said steam-engine, boiler and machinery therein.

The case was heard in the court below on pleadings and proofs, and although there is some conflict in the evidence, there does not appear to be any serious difficulty in arriving at a satisfactory conclusion regarding the leading facts. The buildings mentioned as occupied by the parties respectively are situated upon one of the main business streets of Detroit, in a long block of continuous buildings which extend through to, and have a front upon, another business street of less importance. All the buildings appear to have been constructed with a view primarily and mainly to occupation for business purposes, and the location not less than the nature of the buildings has caused them to be so occupied. The occupants are, in the main, merchants, but some manufactures are also carried on in the block, among which is the manufacture of tobacco, requiring heavy machinery moved by the power of steam. All the time a greater or less number of

families have resided in the block, generally over stores and manufactories, but the tendency has been for families to give way to business, and at present but few remain; probably not more than would be found in almost any business block in a town of corresponding size. The defendants began converting their buildings into a steam flouring-mill very early in 1870, and had the mill in operation about the first of July in that year. The present bill was filed more than a year after the machinery was put there, and more than eight months after the mill was in operation; and it does not appear that while the improvement was going on, or afterwards, except by the commencement of suit, there was any remonstrance on the part of complainant. There can be no question that the mill causes annoyance to complainant and his family, and renders the occupation of his building, as a residence, less desirable, but we are not satisfied by the evidence that there has been any want of due care, or any willful disregard of the rights of their neighbors, in the manner in which the defendants have carried on their business, and there is strong showing that the mill was carefully constructed with a view to avoiding, so far as should be practicable, any annoyance or injury to others. We have no doubt the defendants put in their machinery in entire good faith, supposing they were legally and morally entitled to do so, and that it is not possible for them entirely to avoid causing some annoyance and discomfort to complainant, unless they discontinue wholly the use of their machinery. Whether the value of complainant's premises for business purposes is reduced by the proximity of the mill is a question we need not consider, though some evidence has been produced on both sides of it. For some kinds of occupation his building would undoubtedly be less valuable.

This, we think, is a fair statement of the case, and the question which it presents is, whether the complainant, in consequence of the annoyance which the business of the defendants causes him, is entitled to have that business enjoined. It is not a question of mere damages, such as might arise in an action on the case, but it goes to the foundation of the right in defendants, under the circumstances, to make use of their premises in the manner they have decided to be for their interest; and if the conclusion shall be adverse to them, the loss in the breaking up of their business, and in the depreciation of machinery, which can only be made use of after removal to some new locality, must be very considerable. Nevertheless, if it is the legal right of complainant to have the annoyance to himself and his family enjoined, the unavoidable consequent loss to the defendants can-

not preclude this remedy. The serious consequences to them can be reason only for more careful and patient consideration of the case before the legal principles governing it are applied to their detriment.

Generally speaking, it may be said that every man has a right to the exclusive and undisturbed enjoyment of his premises, and to the proper legal redress if this enjoyment shall be interrupted or diminished by the act of others. The redress, if the injury is slight or merely casual, or if it is in any degree involved in doubt, should be by action for the recovery of damages; but if permanent in its nature so that by persistence in it the wrong-doer might, in time, acquire rights against the owner, it is admissible for the court of chancery to interfere by injunction, provided the injury is conceded or clearly established: *Webb v. Portland Manuf. Co.*, 3 Sum., 189; *Walker v. Shepardson*, 2 Wis., 384; though the power to do so should be cautiously and sparingly exercised: *Attorney-General v. Nichol*, 16 Ves., 338; *Rosser v. Randolph*, 7 Port., 238. An offensive trade or manufacture may call as legitimately for the interference of equity as any other nuisance, for, as is said by Sir William Blackstone, though these are lawful and necessary, yet they should be exercised in remote places: 2 Bl. Com., 217; *Catlin v. Valentine*, 9 Paige, 575; *Hackney v. State*, 8 Ind., 494. The right, nevertheless, to have such a business restrained is not absolute and unlimited, but is, and must be in the nature of things, subject to reasonable limitations which have regard to the rights of others not less than to the general public welfare. One man's comfort and enjoyment with reference to his ownership of a parcel of land cannot be considered by itself distinct from the desires and interests of his neighbors, as otherwise the wishes of one might control a whole community, and the person most ready to complain might regulate to suit himself, the business that should be carried on in his neighborhood. In a crowded city some annoyance to others is inseparable from almost any employment, and while the proximity of the stables of the dealers in horses, or of the shops of workers in iron or tin, seems an intolerable nuisance to one, another is annoyed and incommoded, though in less degree, by the bundles and boxes of the dealer in dry goods, and the noise and jar of the wagons which deliver and remove them. Indeed, every kind of business is generally regarded as undesirable in the parts of the city occupied most exclusively by dwellings, and the establishment of the most cleanly and quiet warehouse might, in some neighborhood, give serious offense and cause great annoyance to the inhabitants. This cannot be

otherwise so long as the tastes, desires, judgments and interests of men differ as they do, and no rule of law can be just which, in endeavoring to protect the interests and subserve the wishes of a complaining party, fails to have equal regard to the interests and wishes of others. The true principle has been said by an eminent jurist to be one "growing out of the nature of well ordered civil society, that every holder of the property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." Shaw, Ch. J., in *Commonwealth v. Alger*, 7 Cush., 84.

The question, therefore, in the case at bar must be, whether there is anything in the nature of the case which renders it unreasonable, in view of the relative rights, interests and wishes of both parties and the general welfare of the public, that defendants should continue upon their premises the business they are now engaged in, or whether, on the other hand, the resulting annoyance to the complainant must be regarded as one which is incident to the lawful enjoyment of property by another, and which, consequently, can form no basis for legal redress.

And in considering this question, the fact is to be kept in view that the business of the defendants is one which is lawful in itself and necessary to the community, and which the public good requires shall be carried on by some persons in some locality. The question is, whether it be proper and right that it be carried on in the particular locality where it is now established. Even the most offensive trade, as we have seen, is allowed to be carried on in a *remote* place; and this means, not a place remote from all other occupations and trades, but remote from such other occupation or trade as would be specially injured or incommoded by its proximity; in other words, in a place, which, in view of its offensive nature, is a proper and suitable one for its establishment. The most offensive trades are lawful, as well as the most wholesome and agreeable; and all that can be required of the men who shall engage in them is, that due regard

shall be had to fitness of locality. They shall not carry them on in a part of the town occupied mainly for dwellings, nor, on the other hand, shall the occupant of a dwelling in a part of the town already appropriated to such trades, have a right to enjoin another coming in because of its offensive nature. Reason, and a just regard to the rights and interests of the public, require that in such case the enjoyments of pure air and agreeable surroundings for a home shall be sought in some other quarter; and a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it.

In the case before us we find that the defendants are carrying on a business not calculated to be specially annoying, except to the occupants of dwellings. They chose for its establishment a locality where all the buildings had been constructed for purposes other than for residence. Families, to some extent, occupied these buildings, but their occupation was secondary to the main object of their construction, and we must suppose that it was generally for reasons which precluded the choice of a more desirable neighborhood. The number of these families, moreover, was decreasing, and in view of the size of the block, was really insignificant at the time this machinery was put in. Some kinds of business were then carried on in the block, which were likely to be equally offensive to adjoining proprietors with that of the defendants, and it is not shown that any complaint was made of them. In view of these facts we think it is not shown that the defendants were bound to know they were invading the legal rights of other persons when they established their present business, nor can we say that the evidence satisfies us that they selected an unsuitable locality for the purpose.

We cannot shut our eyes to the obvious truth that if the running of this mill can be enjoined, almost any manufactory in any of our cities can be enjoined upon similar reasons. Some resident must be incommoded or annoyed by almost any of them. In the heaviest business quarters and among the most offensive trades of every city, will be found persons, who, from motives of convenience, economy or necessity, have taken up there their abode; but in the administration of equitable police, the greater and more general interests must be regarded rather than the inferior and special. The welfare of the community cannot be otherwise subserved and its necessities provided for. Minor inconveniences must be remedied by actions for the recovery of damages rather than by the severe process of injunction.

On the whole case we are of opinion that the complainant,

having taken up his residence in a portion of the city mainly appropriated to business, cannot complain of the establishment of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner. We do not find from the evidence that the business of defendants was thus objectionable, or that in the manner of conducting it there is special ground of complaint. And the decree dismissing the bill must, therefore, be affirmed with costs. But the dismissal is to be without prejudice to any proceeding the complainant may be advised to take at law.

The other justices concurred.

ST. HELEN'S SMELTING COMPANY v. TIPPING.

HOUSE OF LORDS. 1865.

[11 *House of Lords Cases* 642.]

This was an action brought by the plaintiff to recover from the defendants damages for injuries done to his trees and crops, by their works. The defendants are the directors and shareholders of the St. Helen's Copper Smelting Company (Limited). The plaintiff, in 1860, purchased a large portion of the Bold Hall estate, consisting of the manor house and about 1300 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that, "the defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapors, and other noxious matter, to issue from the said works, and diffuse themselves over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit, and herbage, were greatly injured; the cattle were rendered unhealthy, and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed, and also the reversionary lands and premises were depreciated in value." The defendants pleaded, not guilty.

The cause was tried before Mr. Justice MELLOR at Liverpool in August, 1863, when the plaintiff was examined and spoke distinctly to the damage done to his plantations, and to the very unpleasant nature of the vapor, which, when the wind was in a particular direction, affected persons as well as plants in his grounds. On cross-examination, he said he had seen the defendants' chimney before he purchased the estate, but he was not aware whether the works were then in operation. On the

part of the defendants, evidence was called to show that the whole neighborhood was studded with manufactories and tall chimneys, that there were some alkali works close by the defendants' works, that the smoke from one was quite as injurious as the smoke from the other, that the smoke of both sometimes united, and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendants' works existed before the plaintiff bought the property was also relied on.

The learned judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbors; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

The defendants' counsel submitted that the three questions which ought to be left to the jury were, "whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." The learned judge did not put the questions in this form but did ask the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative. Whether the business there carried on was an ordinary business for smelting copper, and the answer was, "We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was, "We do not." The verdict was therefore entered for the plaintiff, and the damages were assessed at 361 *l.* 18 *s.* 4½ *d.* A motion was made for a new trial, on the ground of misdirection, but the rule was refused. [4 Best & S. 608.] Leave was however given to appeal, and the case was carried to the Exchequer

Chamber, where the judgment was affirmed; Lord Chief Baron Pollock there observing, "My opinion has not always been that which it is now. Acting upon what has been decided in this court, my Brother Mellor's direction is not open to a bill of exception." [4 Best & S. 616.] This appeal was then brought.

The judges were summoned, and Mr. Baron Martin, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Baron Pigott, and Mr. Justice Shee, attended.

The Attorney-General (Sir R. Palmer) and Mr. *Webster,* for the appellants (defendants in the court below).*

Mr. *Brett,* Mr. *Mellish,* and Mr. *Milward* were for the respondent, but were not called upon to address the House.

THE LORD CHANCELLOR (LORD WESTBURY). My Lords, as your Lordships, as well as myself, have listened carefully to the able argument on the part of the appellants, and are perfectly satisfied with the decision of the court below, and are of opinion that subject to what we may hear from the learned judges, the direction to the jury was right, I would submit that two questions should be put to the learned judges; but at the same time the learned judges will be good enough to understand that if they desire further argument of the case the respondent's counsel must be heard. Otherwise the following are the questions which I propose to put to them: Whether directions given by the learned judge at Nisi Prius to the jury were correct? or, Whether, a new trial ought to be granted in this case? The learned judges will intimate to your Lordships whether they desire to hear further argument on the part of respondent's counsel, or whether they are prepared to answer the questions put to them by your Lordships.

MR. BARON MARTIN said that the judges did not require the case to be further argued, but they requested to have a few moments' consideration to give their answer to the questions put to them.

Adjourned for a short time, and resumed.

MR. BARON MARTIN. My Lords, in answer to the questions proposed by your Lordships to the judges, I have to state their unanimous opinion that the directions given by the learned judge to the jury were correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last twenty years.

THE LORD CHANCELLOR. My Lords, I think your Lordships will be satisfied with the answer we have received from the learned judges to the questions put by this House.

*The argument is omitted.—*Ed.*

My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.

Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper-smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month September, 1860, very extensive smelting operations began on the property of the present appellants, in their works at St. Helen's. Of the effect of the vapors exhaling from those works upon the plaintiff's property, and the injury done to his trees and shrubs, there is abundance of evidence in the case.

My Lords, the action has been brought upon that, and the jurors have found the existence of the injury; and the only

ground upon which your Lordships are asked to set aside that verdict, and to direct a new trial, is this, that the whole neighborhood where these copper-smelting works were carried on, is a neighborhood more or less devoted to manufacturing purposes of a similar kind, and therefore it is said, that inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. My Lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property. Of course, my Lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place.

On these grounds, therefore, shortly, without dilating further upon them (and they are sufficiently unfolded by the judgment of the learned judges in the court below), I advise your Lordships to affirm the decision of the court below, and to refuse the new trial, and to dismiss the appeal with costs.

LORD CRANWORTH. My Lords, I entirely concur in opinion with my noble and learned friend on the Woolsack, and also in the opinion expressed by the learned judges, that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least twenty years; I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice Mellor. He says, "It must be plain, that persons using a lime-kiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.

I perfectly well remember, when I had the honor of being one of the Barons of the Court of Exchequer, trying a case in the

county of Durham, where there was an action for injury arising from smoke, in the town of Shields. It was proved incontestably that smoke did come and in some degree interfere with a certain person; but I said, "You must look at it not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields"; because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.

There is nothing of that sort, however, in the present case. It seems to me that the distinction, in matters of fact, was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law, either abstractedly or with reference to the facts, better than he has done in this case.

LORE WENSLEYDALE. My Lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included: The defendants say, "If you do not mind you will stop the progress of works of this description." I agree that it is so, because, no doubt, in the county of Lancaster above all other counties, where great works have been created and carried on, and are the means of developing the natural wealth, you must not stand on extreme rights and allow a person to say, "I will bring an action against you for this and that, and so on." Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.

My Lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Judgment of the Exchequer Chamber affirming the judgment of the Court of Queen's Bench affirmed; and appeal dismissed, with costs.

CHAPTER II.
Remedies for Nuisances.

BRILL v. FLAGLER.

SUPREME COURT OF NEW YORK. 1840.

[23 *Wendell's Reports* 354.]

* Error from the Dutchess C. P. Flagler sued the Brills in trespass for killing a dog. The defendants pleaded: 1. *Non cul.;* 2. That the dog was accustomed to come upon the close of the defendants and spoil their grass and corn, and chase, pursue and worry their sheep, etc., of which the plaintiff had notice, and because the dog, on, etc., was in the close of the defendants spoiling their grass and grain, and chasing, pursuing and worrying their sheep, etc., they killed him; 3. That the dog was accustomed to come upon the close of the defendants, in the night time as well as in the day time, and by his barking and howling, annoy and disturb the defendants and their families—all of which was well known to the plaintiff, who had been frequently requested to restrain the dog from coming upon the premises of the defendants, but who, although knowing the roving and vicious propensities of the dog, did not restrain him as requested, but wilfully permitted him, from time to time to come upon the premises of the defendants and annoy and disturb them and their families; and because the dog was upon the premises of the defendants and about their dwelling house at the time, etc., annoying, incommoding and disturbing them and their families, and because the dog could not otherwise be restrained, they killed him, as it was lawful for them to do, etc.; 4. The defendants pleaded a fourth plea similar to the second. Issues of fact were joined upon the first, second and fourth pleas, and an issue of law upon the third plea, the plaintiff having demurred to that plea. The common pleas adjudged the third plea bad, and the cause was then tried upon the issues of fact. After the testimony was closed, the court charged the jury, who found a verdict for the plaintiff with $25 damages, upon which judgment was entered. The defendants, on a bill of exceptions, sued out a writ of error.

* A part of the statement of the case and the opinion of the court relating to certain matters of evidence are omitted.—*Ed.*

S. Barculo, for the plaintiffs in error.

H. Swift, for the defendants in error.

By the Court, NELSON, Ch. J. . . . The important question in this case, however, is whether the facts set up in the third plea, constitute a bar to the action. After a full consideration, I am of opinion they do. The demurrer admits that the dog was in the constant habit of coming on the premises, and about the dwelling of the defendants, day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of the family; that the plaintiff was fully advised of this mischievous propensity of the animal, and wilfully neglected to confine him, and that defendants, unable to remove the nuisance in any other way, killed him. No other authority than the experience and observation of every man is necessary to enable him to determine, that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and upon general principles justify all reasonable means to remove it. It would be mockery to refer a party to his remedy by action; it is far too dilatory and impotent for the exigency of the case. Whatsoever unlawfully annoys, or does damage to another, is a nuisance, and may be abated by the party aggrieved, so he commits no riot in the doing of it. 3 Black. Com. 5. At another place, p. 215, the learned author defines it to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. The erection of a pigsty, limekiln, privy, smithforge, tobacco mill, tallow furnace and the like, so near a dwelling-house, that the stench incommodes the family, and makes the air unwholesome, are given in the books as pertinent illustrations of the rule whereby the injured party may take the remedy into his own hands. See Viner, tit. Nuisance, G. & W. . . .

The fact is expressly averred, that the dog could not be restrained or prevented from haunting the dwelling house, and disturbing the family, by an incessant barking and howling night and day, by a resort to means less severe than taking his life. This, I admit, is a very material averment, and the party should be held to strict proof. A needless or wanton destruction of the animal, even to prevent an acknowledged mischief, would be unjustifiable. Regarding, however, as I do, the facts stated in the plea as presenting a case of serious and intolerable nuisance, of which the owner of the animal occasioning it was fully advised, but wilfully neglected to interfere; if no other reasonable means could effectually remove it short of destruction, I cannot doubt but those used were fully justified upon established

principles of the common law. The act was essential to the free and perfect enjoyment by the defendants of their property, as well as to the protection and comfort of their families.

COWEN, J., concurred.

BRONSON, J. I agree that the judgment should be reversed, because the plea was a good bar to the action, and also because improper evidence was given on the question of damages.

Judgment reversed, and judgment for plaintiffs in error on demurrer.

JONES v. WILLIAMS.

COURT OF EXCHEQUER. 1843.

[11 *Meeson and Welsby's Reports* 176.]

Trespass *qu. cl. freg.*—Fourth plea, that the defendant, before and at the said time when etc., and from thence hitherto, hath been and still is lawfully possessed of a certain messuage and dwelling-house, with the appurtenances, adjoining and near to the said close in which etc., in which the defendant and his family, at the said time when etc., and from thence hitherto, have inhabited and dwelt, and still do inhabit and dwell, and wherein the defendant, during all the time aforesaid, carried on, and still doth carry on, the trade and business of a brewer; and because the plaintiff before and at the same time when etc., injuriously and wrongfully permitted and suffered divers large quantities of dirt, filth, manure, compost, and refuse, to be, remain and accumulate in and upon the said close in which &c., by reason whereof divers noisome, offensive, and unwholesome smells, vapours, and stenches, before and at the said time when &c., ascended and came from the said close in which &c., unto and into the said messuage and dwelling-house, and premises of the defendant, to the great damage, nuisance, and annoyance of the defendant and his said family, so inhabiting and dwelling therein, and to the great injury, prejudice, and annoyance of the defendant in his said trade and business of a brewer, he the defendant, at the said time when &c., so entered into the said close in which &c., to remove and abate the said nuisance, &c., [proceeding to justify the trespasses alleged in the declaration, and concluding with a verification].

Replication, *de injuria.*

At the trial of the cause before Gurney, B., at the last Denbighshire Assizes, the defendant had a verdict on this issue.

In Michaelmas Term, *Erle* obtained a rule to show cause why the judgment should not be entered for the plaintiff, *non obstante verdicto;* against which

Jervis and *Welsby* shewed cause.

Erle and *Townsend* contra.*

The judgment of the Court was now delivered by

PARKE, B. A rule was obtained in this case, by Mr. *Erle,* for judgment *non obstante verdicto* on the 4th plea found for the defendant, and argued a few days ago. This plea, to an action of trespass *quare clausum fregit,* stated, that the defendant, before and at the said time when &c., was possessed of a dwelling-house, near the *locus in quo,* and dwelt therein; and that the plaintiff, before and at &c., *injuriously and wrongfully permitted and suffered* large quantities of dirt, filth, manure, compost, and refuse, to be, *remain,* and *accumulate* on the locus in quo, by reason whereof divers noxious, offensive, and unwholesome smells, &c., came from the close into the defendant's dwelling-house; and then the defendant justifies the trespass, by entering in order to abate the nuisance, and in so doing damaging the wall, and digging up the soil.

The question for us to decide is, whether this plea is bad after verdict; and we are of opinion that it is.

The plea does not state in what the wrongful permission of the plaintiff consisted; whether he was a wrong-doer himself, by originally placing the noxious matter on his close, and afterwards permitting it to continue; or whether it was placed by another and he omitted to remove it; or whether he was under an obligation by prescriptive usage or otherwise, to cleanse the place where the nuisance was, and he omitted to discharge that obligation, whereby the nuisance was created. The proof of any of these three circumstances would have supported the plea; and if in none of the three cases a notice to remove the nuisance was necessary before an entry could take place, the plea is good; but, if notice was necessary in any one, the plea is bad, by reason of its neither containing an averment that such a notice was given, or showing that the continuance was of such a description as not to require one.

It is clear, that if the plaintiff himself was the original wrong-doer, by placing the filth upon the *locus in quo,* it might be removed by the party injured, without any notice to the plaintiff; and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the *locus in quo* afterwards, the authorities are in favor of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands.

* The arguments of counsel are omitted.—*Ed.*

We do not rely on the decision in *The Earl of Lonsdale v. Nelson*, as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz. a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord Wynford's dictum is in favor of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another. *Penruddock's case* shows that an assize of *quod permittat prosternere* would not lie against the alienee of the party who levied it without notice. The judgment in that case was affirmed on error; and in the King's Bench, on the argument, the judges of that Court agreed that the nuisance might be abated, without suit, in the hands of the feoffee; that is, as it should seem, with notice, for in Jenkins's Sixth Century, case 57, (no doubt referring to *Penruddock's case*), the law is thus stated:—"A. builds a house, so that it hangs over the house of B., and is a nuisance to him. A. makes a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continues. Now D. cannot abate the said nuisance, or have a *quod permittat* for it, before he makes a request to C., to abate it, for C. is a stranger to the wrong; it would be otherwise if A. continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request."

We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrong-doer, by having levied the nuisance, or neglected to perform some obligation, by the breach of which it was created.

Lord Abinger, C. B., observed, that it might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice; but then it should be so pleaded; in which the rest of the Court concurred.

*Rule absolute.**

*In *People ex rel. Copcutt v. Board of Health* (1893) 140 New York 1, at page 10, the court says, "The result of these authorities is that whoever abates an alleged nuisance and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy and is founded upon fundamental constitutional principles."

BLACKSTONE'S COMMENTARIES, Book III, pp. 220-222.

The remedies by suit are, 1. By action on the case for damages, in which the party injured shall only recover a satisfaction for the injury sustained, but cannot thereby remove the nuisance. Indeed, every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions: the *assize of nuisance,* and the writ of *quod permittat prosternere;* which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nuisance that occasioned the injury. These two actions, however, can only be brought by the tenant of the freehold; so that a lessee for years is confined to his action upon the case.

2. An *assize of nuisance* is a writ, wherein it is stated that the party injured complains of some particular fact done, *ad nocumentum liberi tenementi sui,* and therefore commanding the sheriff to summon an assize, that is, a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein; and if the assize is found for the plaintiff, he shall have judgment of two things: 1. To have the nuisance abated; and, 2. To recover damages. Formerly an *assize of nuisance* only lay against the very wrong-doer himself who levied or did the nuisance, and did not lie against any person to whom he had alienated the tenements whereon the nuisance was situated. This was the immediate reason for making that equitable provision in statute Westm. 2, 13 Edw. 1. c. 24, for granting a similar writ *in casu consimili,* where no former precedent was to be found. The statute enacts that, *"de cetero non recedant querentes a curia domini regis, pro eo quod tenementum transfertur de uno in alium";* and then gives the form of a new writ in this case; which only differs from the old one in this, that where the assize is brought against the very person only who levied the nuisance, it is said *"Quod* A. (the wrong-doer) *injuste levavit tale nocumentum";* but where the lands are aliened to another person, the complaint is against both, *"quod* A. (the wrong-doer) *et* B. (the alienee) *levaverunt."* For every continuation, as was before said, is a fresh nuisance, and therefore the complaint is as well grounded against the alienee who continues it as against the alienor who first levied it.

3. Before this statute, the party injured, upon any alienation of the land wherein the nuisance was set up, was driven to his *quod permittat prosternere,* which is in the nature of a writ of right, and therefore subject to greater delays. This is a writ commanding the defendant to permit the plaintiff to abate, *quod permittat prosternere,* the nuisance complained of; and, unless he so permits, to summon him to appear in court, and show cause why he will not. And this writ lies as well for the alienee of the party first injured, as against the alienee of the party first injuring; as hath been determined by all the judges. And the plaintiff shall have judgment herein to abate the nuisance, and to recover damages against the defendant.

Both these actions of *assize of nuisance,* and of *quod permittat prosternere,* are now out of use, and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages. Yet, as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable by one that hath possession only, against another that hath like possession, the process is therefore easier, and the effect will be much the same, unless a man has a very obstinate as well as an ill-natured neighbor; who had rather continue to pay damages than remove his nuisance. For in such a case recourse must at last be had to the old and sure remedies, which will effectually conquer the defendant's perverseness, by sending the sheriff with his *posse comitatus,* or power of the county, to level it.

CAMPBELL v. SEAMAN.

COURT OF APPEALS OF NEW YORK. 1876.

[63 *New York Reports* 568.]

* EARL, J. The plaintiffs owned about forty acres of land, situate in the village of Castleton, on the east bank of the Hudson river, and had owned it since about 1849. During the years 1857, 1858, and 1859 they built upon it an expensive dwelling-house, and during those years, and before and since, they improved the land by grading and terracing, building roads and walks through the same, and planting trees and shrubs, both ornamental and useful.

The defendant had for some years owned adjoining lands, which he had used as a brick-yard. The brick-yard is southerly

* The statement of facts, arguments of counsel, and portions of the opinion of the court are omitted.—*Ed.*

of plaintiffs' dwelling-house about 1,320 feet, and southerly of their woods about 567 feet. In burning bricks defendant had made use of anthracite coal. During the burning of a kiln sulphuric acid gas is generated, which is destructive to some kinds of trees and vines. The evidence shows, and the referee found, that gas coming from defendant's kilns had, during the years 1869 and 1870, killed the foliage on plaintiffs' white and yellow pines and Norway spruce, and had, after repeated attacks, killed and destroyed from 100 to 150 valuable pine and spruce trees, and had injured their grape vines and plum trees, and he estimated plaintiffs' damages from the gas during those years at $500.

This gas did not continually escape during the burning of a kiln, but only during the last two days, and was carried into and over plaintiffs' land only when the wind was from the south.

It is a general rule that every person may exercise exclusive domain over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non laedas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. As Lord Justice James beautifully said, in *Salvin v. Northbrancepeth Coal Co.* (9 Law R., Ch. Appeals, 705): "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town which would drive the Dryads and their masters from their ancient solitudes."

But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he make an unreasonable, unwarrantable or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor. And the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's property cannot be defined by any certain gen-

eral rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient.

Within the rules thus referred to, that defendant's brick burning was a nuisance to plaintiffs cannot be doubted. Numerous cases might be cited, but it will be sufficient to cite, mainly, those where the precise question was involved in reference to brick burning. . . .

Without further citation of authority I think it may safely be said that no definition of nuisance can be found in any text book or reported decision which will not embrace this case.

But the claim is made that although the brick burning in this case is a nuisance, a court of equity will not and ought not to restrain it, and the plaintiffs should be left to their remedy at law to recover damages, and this claim must now be examined.

Prior to Lord Eldon's time, injunctions were rarely issued by courts of equity. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and with the development of equity jurisprudence, which has taken place since his time, it is well said that the writ of injunction has become the right arm of the court. It was formerly rarely issued in the case of a nuisance until plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania, that this writ is not matter of right, but of grace, to a large extent prevailed. But now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case either in granting or refusing it, the error is one to be corrected upon appeal. (*Corning v. Troy Iron and Nail Factory,* 40 N. Y., 191; *Reid v. Gifford,* Hopkins' Ch., 416; *Pollitt v. Long,* 58 Barb., 20; *Mohawk and Hudson R. R. Co. v. Artcher,* 6 Paige, 83; *Parker v. Winnipiseogee Lake Cotton and Woolen Co.,* 2 Black [U. S.], 545, 551; *Webber v. Gage,* 37 N. H., 182; *Dent v.*

Auction Mart Association, 35 L. J. [Ch.] 555; *Attorney-General v. United Kingdom Tel. Co.,* 30 Beav., 287; *Wood v. Sutcliffe,* 2 Sim. [N. S.], 165; *Clowes v. Staffordshire Potteries Co.,* L. R., 8 Ch. App., 125.) Here the remedy at law was not adequate. The mischief was substantial and, within the principle laid down in the cases above cited and others to which our attention has been called, irreparable.

The plaintiffs had built a costly mansion and had laid out their grounds and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of his ornamental trees, and the flowers and vines which surrounded his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. (*Cook v. Forbes,* L. R., 5 Eq. Ca., 166; *Broadbent v. Imperial Gas Co.,* 7 DeG., McN. & G., 436.) These damages are irreparable too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health.

Here the injunction also prevents a multiplicity of suits. The injury is a recurring one, and every time the poisonous breath from defendant's brick-kiln sweeps over plaintiffs' land they have a cause of action. Unless the nuisance be restrained the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted by the termination of such litigation by a single suit.

The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from plaintiffs' lands. Nuisances causing damage less frequently have been restrained. (*Ross v. Butler,* 19 N. J., 294; *Meigs v. Lister,* 23 N. J. Eq. R., 200; *Clowes v. North Staffordshire Potteries Co., supra; Mulligan v. Eliot,* 12 Abb. Pr. R. [N. S.], 259.)

It matters not that the brick-yard was used before plaintiffs bought their lands or built their houses. (*Taylor v. The People,*

supra; Wier's Appeal, 74 Penn., 230; *Brady v. Weeks,* 3 Barb., 156; *Barnwell v. Brooks,* 1 Law Times [N. S.], 454.) One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria.* But he cannot place upon his land any thing which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow. . . .

It follows from these views that the judgment should be affirmed.

All concur.

Judgment affirmed.

COOKE v. FORBES.

COURT OF CHANCERY. 1867.

[*Law Reports,* 5 *Equity* 166.]

The bill was filed by William Cooke, Samuel Hindley, and David Law, of Friday Street, in the city of London, wholesale carpet dealers, and dealers in cocoa-nut fibre and cocoa-nut fibre matting, lessees for a term of twenty-one years, from the 14th of November, 1849, of a manufactory at Old Ford, Bow, Middlesex, adjoining the river Lea, and James Figgis, of Cannon Street, Old Ford, Bow, tenant of the premises, and manufacturer of matting for the other plaintiffs, against James Forbes and John Abbot, who, in the year 1863, became and had since been occupiers of premises abutting on those of the plaintiffs towards the north.

From the allegations in the bill it appeared that the work carried on by Figgis consisted of weaving cocoa-nut fibre into mats, for which purpose the matting had to be immersed in bleaching liquids, and then hung out to dry. Ever since May, 1863, fumes had issued from the works of the defendants, who were manufacturers of sulphate of ammonia and carbonate of ammonia from the ammoniacal liquor of gas works, particularly when the wind was in the north-west, north, or north-east, the effect of which was to turn the plaintiffs' matting, when hung up to dry after bleaching, from a bright to a dull and blackish colour, requiring the material to be again dyed, at considerable expense, the colour even then being permanently injured. These fumes

were also alleged by the bill to be offensive to the smell, and injurious to the health of Figgis and his family, who were inmates of the manufactory, and of his servants and workmen; but this part of the case was abandoned in the reply.

Although the defendants commenced as above stated in May, 1863, the plaintiffs only in March, 1865, ascertained positively that the fumes from the defendants' works were the true cause of the injury, since which time they had remonstrated in vain.

Up to the time of filing the original bill (31st of October, 1865), the plaintiffs were unable to discover the nature of the defendants' process, save that, from certain tests, it appeared to be a process which threw off sulphuretted hydrogen, ammonia, and other noxious gases in large quantities; and up to the same date all inspection by the plaintiffs had been refused by the defendants.

The bill alleged damage, and prayed that the defendants might be restrained "from carrying on the said works of the defendants in such a manner as in any way to operate to the damage of the plaintiffs, or any of them, or of their or any of their servants, workmen, or agents, or of the said manufactures so carried on by the plaintiff, James Figgis, as aforesaid," and for payment of such damages as the court might think the plaintiffs entitled to receive.

On the 23rd of February, 1866, the defendants filed an answer, in which they stated that shortly after the commencement of their occupation in 1863, they erected a valuable plant and machinery for carrying on the business above stated, and extraordinary precautions were taken to prevent the escape of free ammonia and sulphuretted hydrogen, with the double object of economy and of obviating all injurious effects.

They said that after their occupation, they began erecting a new chimney shaft, whereupon Figgis inquired what the works were to be, and on being told the nature of the manufacture, said he would consult his solicitor, and try and stop the business. No steps, however, were taken by him as threatened; and the works were erected without opposition.

Defendants' premises adjoined the river Lea, and consisted of a manufactory, and a wharf called Iceland Wharf. To this wharf the ammoniacal liquor was pumped by steam through pipes into the manufactory, and submitted to a series of processes, which the answer minutely described, and then stated as follows:—"In the conduct of all these operations, from first to last, the utmost precautions are taken to prevent the escape of any sulphuretted hydrogen or ammonia, and such escape is effectually prevented,

and so completely so, that the test papers remain unaffected though held in the steam arising from the open vessels where the sulphate of ammonia is evaporated."

It was further stated, and not disputed, that from the manufacture of carbonate of ammonia "no sulphuretted hydrogen, or any other noxious fume," issued.

The defendants accounted for the discolouration of the plaintiffs' goods by saying that they believed the bleaching liquid consisted of a weak solution of oil of vitriol, and that the effect of the bleaching was for a time to put a face on the matting so as to discharge, to some extent, the dark colour of the fibre, but the use of the acid was liable to cause discolouration by reason of its counteraction when it became concentrated in the act of dyeing, and the bright colour at first imparted was not permanent. They further stated that, since 1865, from causes which they specified, "the best cocoa-nut matting has been, and is still, made without bleaching or dyeing."

Finally, they denied that the discolouration complained of was caused by fumes from their works, or that any injurious fumes issued either from their works or from the river adjoining.

Issue having been joined on the 26th of June, 1866, on the proposal of the defendants, the plaintiffs not objecting, the evidence was ordered to be taken *viva voce.*

The plaintiffs established the fact that they used no sulphuric acid, and that the basis of their bleaching liquid was chloride of tin, which they said was darkened by the sulphuretted hydrogen.

On the other points the evidence will be found fully discussed in the judgment.

Mr. *Grove,* Q. C., Mr. *Little,* Q. C., and Mr. *Locock Webb,* for the plaintiffs.

Mr. *G. M. Gifford,* Q. C., Mr. *Kay,* Q. C., and Mr. *Martineau,* for the defendants.*

Dec. 11. Sir W. Page Wood, V. C., after stating the nature and frame of the suit continued:—

The question of health was, I think, very properly, abandoned in reply, inasmuch as the circumstances are strong to show that no such injury has been inflicted.

The case, then, is reduced to the question of the injury which is alleged to have been done to the plaintiffs' manufacture:—[His Honour read the principal allegations in the bill.]

It is important to see what the issues raised in the pleadings are, because the defendants do not say (indeed, they could not

* The arguments of counsel are omitted.—*Ed.*

have said, although it was so argued for them by their counsel at the bar): "We are entitled to pour noxious fumes into your property, and you are not entitled to complain if you should suffer any injury in your manufacture; more especially regard being had to your choosing to establish in this neighbourhood a manufacture which requires such delicate handling as that a particular gas will affect it and impair its value." What they say by their answer, impliedly, if not distinctly, is—that their manufacture does require the greatest possible precautions to avoid the emission of sulphuretted hydrogen, which everybody knows to be a very offensive gas; that they have taken those precautions successfully, and that, in fact, no damage has been done. I may here say, I think it proved beyond dispute in this case, that sulphuretted hydrogen does produce an injurious effect to a certain degree on the manufacture of cocoa-nut matting, owing to the use in the bleaching liquid of chloride of tin, which when affected by sulphuretted hydrogen is turned to a darker colour.

In that state of things, I apprehend the issue is reduced to one of mere fact, not simply whether or not any damage has been done, but with reference, also, to the extent of the damage, and as to the necessity of granting an injunction, upon which point I took time to consider the whole case.

As regards the state of the law upon the question, whether or not a person is entitled, because there are noxious vapours existing already in the neighbourhood, to add to that accumulation by creating additional vapours, and pouring them in upon his neighbour's property, it is sufficient to say that it is well settled by the case of *St. Helen's Smelting Co. v. Tipping,* [11 H. L. C. 642], where the summing up of Mellor, J., was approved by the House of Lords, and must be taken to have laid down the correct law on the subject.

Consequently, it appears to me quite plain that a person has a right to carry on upon his own property a manufacturing process in which he uses chloride of tin, or any sort of metallic dye, and that his neighbour is not at liberty to pour in gas which will interfere with his manufacture. If it can be traced to the neighbour then, I apprehend, clearly he will have a right to come here and ask for relief.

But the real point I have to consider and determine is, whether a person carrying on a manufacture in itself lawful—a manufacture required to be carried on with great precaution in order that the neighbour may not be injured, but still using these precautions, and yet occasionally, by accident, injuring that neighbour—whether that is a case for an injunction, or whether it is not a case in which, when the neighbour is injured, his remedy

must be by action. In other words, whether a man is to be placed under the necessity of carrying on his manufacture subject to perpetual applications for commitment for contempt, because his manufacture is of such a character as that, whenever an accident does occur, some damage may be inflicted upon his neighbour.

I take it in such a case as I have mentioned, although I have not found any authority expressly pointing to it, there is a limit which must be drawn. If a person has a quantity of material necessary for the manufacture of gunpowder, of so dangerous a character that if the slightest accident occur the damage done to his neighbours is irreparable—gunpowder being an article that if kept in quantities near any public highway, or near any property where individuals are living, is itself a nuisance, and held to be so in law—in that state of things the Court will interfere at once by injunction. I acted upon the same principle in the jute case, *Hepburn v. Lordan,* [2 H. & M. 345]. I thought it was within the doctrine of the gunpowder case, that a person could not be allowed to expose jute to dry where the consequences of a slight accident would be fatal to everybody around. Here I have nothing of that description. This is an instance of a person carrying on a manufacture which, if his neighbour had not happened to have another manufacture of great delicacy, probably would not have caused any injury to the neighbour. Still, he has not a right to injure his neighbour's manufacture at all; and if it had been proved to me that the injury was of such a character as I have described, a grave injury occurring every time that an accidental escape took place—or if it had been proved to me that there had been a constant repetition of the injury, then, I apprehend, the proper course would have been to grant an injunction.

But if, on the other hand, it should be proved—and that is the conclusion I have come to upon a careful consideration of the evidence— that the injury, though it may have occasionally happened, is, to the whole extent of it, not traceable to these works, then, notwithstanding the authority of the *St. Helen's Case,* the plaintiff will not be entitled to an injunction. Or, if there be no right asserted by the defendant to injure his neighbour; if, on the contrary, the assertion by him is that he does not do it, or that, if he does, it is simply from accidental circumstances, which from time to time happen, and for which the plaintiff may have a remedy in damages; and if it appears that that is what the case amounts to upon the evidence, it does not seem to me that the proper remedy is by injunction in this Court.

I have referred to the case of *Attorney-General v. Sheffield*

Gas Consumers Company, [3 D. M. & G. 304], in which Lord Justice Knight Bruce differed from Lord Justice Turner and the Lord Chancellor:—[His Honour reviewed that case at length, and observed that there the injunction was refused because the injury, which consisted of hindrance to traffic from taking up parts of streets by a private gas company, was neither serious nor continuous. His Honour then continued:—]

Now, I have to inquire what is the extent of the injury here? Upon the whole evidence I do not find anything to satisfy me that there were more than three occasions, at most, during the period of four years and a half since the defendants' manufacture commenced, when injury of any description was done. The question then being as I have before described it, I confess the case appears to me to be one much more governed by the doctrine which was referred to in *Attorney-General v. Sheffield Gas Consumers Co.,* [3 D. M. & G. 304], than any of those cases where the injury is either very vast, or of very sudden or frequent occurrence, or where the right is set up to inflict the injury. It is not because counsel argued that the defendants would have a right to do this—that being one of the points of law which they thought it right to submit to the Court—that therefore I am to assume that the defendants make it. As I have said, I do not find that the defendants have ever asserted a right to pour out anything deleterious upon their neighbours.

As to the extent of the damage, I am left extremely in the dark; but, as far as the evidence goes, if I had to decide upon it as a jury I should not feel competent to assess anything more than nominal damages. The only satisfaction I have in disposing of the case on these grounds is, that a jury would not have assisted me, because with a jury I could only have tried the particular cases on the particular days specified, of which days I have already given the plaintiff the benefit. I think that he has shown evidence which might have satisfied a jury that upon two days mischief was done. I think as to the third there may be a doubt. He may have the benefit of the doubt, but a jury could not tell me that there was a single other day upon which it happened, because there is no evidence to go to a jury as to damage on any other day.

The result, therefore, of the whole case is, that I must dismiss the bill. I do not think it a case for an injunction, and considering that the bill was filed so late as it was, and considering all the opportunities given to the plaintiff to make out his case, of which he did not avail himself, I am bound to dismiss it with costs, without prejudice to any action he may be advised to bring if he thinks he can get damages.

SOLTAU v. DE HELD.

COURT OF CHANCERY. 1851.

[2 *Simon's Reports* (*New Series*) 133.]

* Previously to 1817, a mansion-house in Park Road, Clapham, was divided into two messuages, but without there being any party-wall between them; and, on the 25th of March, 1817, the plaintiff took a lease of one of the messuages for sixty-nine years: and, with the exception of two intervals, he had, ever since, resided in it with his family. The other messuage was occupied as a private residence up to July 1848, when it was purchased by a religious order of Roman Catholics, called "The Redemptorist Fathers"; and they converted the ground-floor into a chapel, and appointed the defendant, who was a priest of the Roman Catholic church, to officiate in it. In August, 1848, the defendant caused a wooden frame to be erected on the roof of the last-mentioned messuage, and a bell to be hung in it, which was rung, by his direction, five times on Monday, Tuesday, Wednesday, Thursday, and Friday; six times on Saturday, and oftener on Sunday, in every week: the ringing ordinarily commenced at five in the morning, and continued for ten minutes, to the great discomfort and annoyance of the plaintiff and his family. . . .

In May, 1851, a Roman Catholic church with a steeple, was erected on the ground adjoining the chapel, and was opened on the 14th of that month, and, on that occasion, six bells, which had been placed in the belfry of the steeple were rung nearly the whole day. The chapel bell was rung at five o'clock and a quarter before seven every morning: the steeple bell, at a quarter to nine every morning and a quarter before and a quarter past seven every evening. On 13th of May, 1851, a peal of six bells was rung several times: on the 14th, the peal continued, at intervals, during the whole day: on Sunday, the 18th, the chapel bell rang at five o'clock, the steeple bell at quarter to seven, and again at a quarter to nine. The chapel bell again rang at half-past ten. A peal of chimes was rung at eleven, and, again at a quarter before one; again at a quarter before six, and again at a quarter before eight. On Saturday the 24th May, the chapel bell rang, as usual, the three times above mentioned, and the steeple bell twice, and, in addition, a peal of the six bells was rung from half-past eight till a quarter to ten at night. On

* The arguments of counsel and portions of the statement of facts and of the opinion of the court are omitted.—*Ed.*

Sunday, the 25th May, the chapel bell was rung at two different times, and the steeple bell seven different times. On Monday evening, the 2nd June, a peal of the bells was rung; and, on Saturday, the 7th, a peal was rung from a quarter to eight to a quarter to nine. On Saturday the 8th of June, in addition to the ordinary bells, the chimes were rung several times up to nearly nine in the evening. The chapel bell and church bells were, subsequently to 20th of May, rung, daily, upon an average, as great a number of times as they had been rung upon the several occasions before mentioned, down to the time when the plaintiff obtained a verdict in the action after mentioned.

The bill was filed on the 20th of November, 1851, and, after stating as above, it alleged that, when a peal of the church bells was rung, the noise was so great that it was impossible for the plaintiff, or the members of his family, to read, write, or converse in his house: that the ringing of the chapel bell and church bells was an intolerable nuisance to the plaintiff, and, if the said bell or bells was or were permitted to be rung in the manner in which the same were so rung as aforesaid, it would be impossible for the plaintiff to reside, any longer, in his house; that, in consequence of the before-mentioned grievance, the plaintiff applied to the defendant, to desist from ringing the said bells or any of them, so as to occasion any annoyance to the plaintiff; and, the defendant having refused to comply with that application, the plaintiff, in June 1851, commenced an action against the defendant to recover damages for the nuisance committed, to him, by means or in consequence of the before-mentioned ringing of the said bell or bells: that the action was tried on the 13th August 1851, when a verdict was found for the plaintiff, with forty shillings damages and costs: that, on the 10th November, 1851, judgment in the action was signed, and it remained unreversed.

The bill further alleged that, some time after the commencement of the said action, the chapel bell was removed, from the roof, to one of the sides of the chapel, and, after the 13th August, neither that bell nor the church bells were rung until Sunday the 9th November 1851. . . .

The bill prayed that the defendant and all persons acting under his directions or by his authority, might be restrained from tolling or ringing the chapel bell and the church bells, or any of such bells, and from permitting the said bell and bells, or any of them, to be tolled or rung; or that the defendant and such persons as aforesaid, might, in like manner, be restrained from tolling or ringing the said bell or bells, or permitting the same or

any of them to be tolled or rung, so as to cause or occasion any nuisance or annoyance to the plaintiff or any of the members of his family residing at his residence in Park Road, Clapham.

On the day after the bill was filed, the plaintiff served the defendant with notice of a motion that the defendant and all persons acting under his directions or by his authority, might be restrained from tolling or ringing the chapel bell and the church bells or any of them, or permitting them or any of them to be tolled or rung. . . .

The VICE-CHANCELLOR [Lord Cranworth]:—

This case came before me, in the first instance, by way of demurrer; and, the demurrer having been overruled a motion for an injunction was made. I abstained from expressing, at the time, my reasons for overruling the demurer, from an apprehension that I might intimate some opinion or drop some expression that might prejudice the argument on the motion. I shall now state my reasons for overruling the demurrer, and then I shall give my opinion on the motion.

The demurrer is a general demurrer for want of equity; and of course, by that demurrer, the defendant undertakes to show that, upon the statements contained in the bill, the plaintiff would not be entitled to any relief at the hearing of the cause. . . .

The next ground insisted upon in support of the demurrer, was that the plaintiff had not established his right at law. Now, it is true that Equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law; there is no such thing as an equitable nuisance: but it is no ground of demurrer that the matter has not been tried at law. It very often is a ground for refusing an injunction; but it is not ground of demurrer, as appears from *Berkley v. Ryder,* 2 Vesey, sen., p. 533, and from Lord Cottenham's judgment in *Elmhirst v. Spencer,* where his Lordship expresses himself thus: "The plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury, by the acts of the defendant, as would have entitled him to a verdict at law, in an action for damages." And then, in another part of the same judgment, he says: "This Court will not take upon itself to adjudicate upon the question whether this is a nuisance or not: that must be ascertained in a court of law, as laid down by Lord Eldon in *The Attorney-General v. Cleaver.*" Now, in *The Attorney-General v. Cleaver,* which was a case of public nuisance, Lord Eldon directed the indictment, which had been already brought and was pending, to be prosecuted, and ordered the motion to stand

over until the hearing of it. Therefore Lord Cottenham, in that case, is referring to this; that you cannot ask for the injunction if there be a question about its being a nuisance at law. But I do not know where it is laid down that a bill will not lie, that is, that it is a ground of demurrer because the action has not yet been brought. However, whether that be so or not, the plaintiff in this case has brought his action at law, and obtained a verdict.

Then this ingenious argument was adduced. It was said: "There has been an action at law; but what is now being done, and which you call a nuisance, has never been tried at law. When the trial took place we were ringing every day in the week; we were beginning at five o'clock in the morning, and we were ringing a considerable period of time on each occasion; but now we ring only on Sundays. We ring a fewer number of times, and do not ring so long at a time. Therefore you must bring your action for this, and try whether this is a nuisance." If that argument were to prevail, see what it would come to. Supposing that, after the trial of the action, the defendant, instead of ringing seven days in the week, had rung six; or, instead of beginning at five o'clock in the morning, had begun at six; or, instead of ringing for a quarter of an hour, had rung ten minutes each time; and, when the plaintiff came into Equity to restrain him, he had said: "You have not tried this. When you brought your action, I rang seven days in the week. I ring only six now. I began at five o'clock: I now begin at six in the morning." If that were yielded to, and another action brought and damages recovered, the defendant would reduce the number of days' ringing from six to five, and say you had not tried this; and so on *toties quoties*. It is clear the argument, if pushed to its full extent, must result in that which is contrary to all reason and to all justice. The questions to be tried were, whether the plaintiff's right in his house was such as to entitle him to come for relief at all, and whether the ringing of the bells was in its nature, a nuisance at law. Both those questions have been tried; but the exact extent or *quantum* of injury or nuisance inflicted, need not be ascertained. Besides, the whole argument upon this ground is put an end to by an allegation in the bill, which the demurrer, of course, admits to be true: "that the defendant threatens and intends, not only to continue tolling or ringing the last mentioned bells every Sunday in the manner last aforesaid; but he also threatens and intends to ring peals of the said six bells, and also to toll and ring, on week days; and he also threatens and intends to toll and ring the bell of the before-mentioned chapel or religious house."

Therefore, upon this demurrer, it is quite clear that the argument that the plaintiff has not established his right at law, cannot be maintained.

There was one point raised by the plaintiff which I do not think it necessary to go into. The plaintiff insisted that it was illegal for Roman Catholics to ring and toll bells in a steeple annexed to their place of worship. It appears to me whether that be so or not, is perfectly immaterial to this case; because, if it be illegal, I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not grant an injunction to restrain a man from smuggling, which is an illegal act. If it be illegal, the illegality of it is no ground for my interfering. Therefore, I do not at all go into the question, whether, under the numerous Acts of Parliament relating to Roman Catholics, it be or be not now lawful to have a steeple and bells. For the reasons which I have mentioned, I overrule the demurrer. . . .

KENNERTY v. ETIWAN PHOSPHATE COMPANY.

SUPREME COURT OF SOUTH CAROLINA. 1882.

[17 *South Carolina Reports* 411.]

August 8, 1882. The opinion of the court was delivered by MR. JUSTICE MCGOWAN.—The plaintiff owns a farm near the works of the Etiwan Phosphate Co., which was incorporated for the purpose of carrying on the business of manufacturing commercial fertilizers. He alleges that in their business the defendants manufacture large quantities of sulphuric acid, which is one of the most pernicious gases in its effects upon vegetable and animal life; that the works are so constructed that sulphuric acid gas and other pernicious gases and noisome smells escape in the atmosphere and come over and on his farm and dwelling-house, to the injury of the crops and trees so as unpleasantly to affect him in his own person, both in his fields and home, and by so doing the plaintiff is irreparably damaged by the defendant corporation. . . .*

The plaintiff does not allege that the defendants have failed to perform any of the covenants to be by them performed. He does, however, allege that the danger of the injury above stated recurs with every season, and that he has no adequate remedy at law, and prays an injunction against the defendant. An order was granted temporarily restraining the defendant from so using

* The facts and opinion of the court relating to certain covenants are omitted.—*Ed.*

its works as to injure the plaintiff. It seems that an answer and a reply were filed, but without taking evidence, upon motion after notice. Judge Kershaw granted an order to dismiss the complaint upon the ground that "it did not state facts sufficient to constitute a cause of action." The parties disagreeing about the "Case" for the Supreme Court, the judge settled it by directing the answer and reply to be stricken out and only the complaint included. From this order the plaintiff appealed, and also from the order dismissing the complaint, upon the following exceptions:

. . . All the other exceptions insist that the complaint did state facts sufficient to authorize the court to grant the injunction prayed for, and that the order dismissing the complaint was error. The principles involved are important and the consequences serious. It is not a small matter to embarrass or destroy an industry so useful as that of the Etiwan Phosphate Company, because of the consequences of operating their works in a legitimate business chartered by the State, upon their own land, and with no unlawful intent; and on the other hand it is even more important to secure to every man the enjoyment of that which is a common right, the use of pure and uncorrupted air.

For the purposes of the case we must consider the statements of the complaint as true, and so considering them, was such a case made as entitled the plaintiff to the injunction prayed for? First consider how the matter would stand if there had been no former action between the parties or covenant on the part of the plaintiff not to sue, but the action was an original proceeding of the plaintiff against the defendant for injunction. The matter complained of was that the works of the defendant company operated as a private nuisance, injuring the plaintiff in his person and in his property. The complaint was in the equity jurisdiction, not for past damages for corrupting the air, but for an injunction against the throwing off of such gases in the future, even if it resulted in the stoppage of the works. The existence or non-existence of a nuisance was necessarily involved in the question.

The Court of Equity is not the appropriate tribunal for the trial of such an issue. In such case the general rule undoubtedly is that equity will not grant an injunction until the legal rights of the parties are determined and the fact that a nuisance exists is established in a law court, which is the proper tribunal to decide such questions and measure the damages. The fact of damage is one which the defendant had a right to have passed upon by a jury, and the right of the plaintiff in case of success

in that issue to have an injunction against the continuance of the nuisance was supplementary thereto. It may be conceded that the facts stated should constitute a cause of action at law for damages, but it does not necessarily follow that they constitute a cause of action in equity as an original proceeding for the special relief of injunction.

"The equity for an injunction attaches only on an admitted or legally adjudged right in the plaintiff, admitted or legally adjudged to be infringed by the defendant. The existence of the right and the fact of its infringement must be tried, if disputed, in a court of law, and therefore if the plaintiff resorts to equity in the first instance he should move forthwith for an interlocutory injunction to protect his alleged right until decree, and thus give an opportunity for directing the trial at law, so that when the cause comes on for hearing it may be ready for immediate adjudication. When a motion for an interlocutory injunction is made, the court, having regard to the extent of *prima facie* title shown, the probability of mischief to the property, *and the balance of inconvenience on either side,* will either grant the injunction accompanied by a provision for putting the legal right into an immediate course of trial, or will send the parties to law, directing the defendant to keep an account, or will merely retain the bill with liberty to the plaintiff to proceed at law." Adam's Equity, 497; *Wilson v. Cohen,* Rice's Ch. 83. The complaint in this case neither alleged that the nuisance charged had been admitted or legally adjudged, nor that an action was pending in a law court, nor did it ask leave to make up an issue to try the question.

It is true to this general rule there are exceptions. The court as an original matter will intervene in extreme cases, for example when the thing itself is a nuisance *per se,* or the mischief is irreparable and not susceptible of compensation in damages. The doctrine as we understand it is stated in the case of the *Mohawk Bridge Co. v. The U. and S. R. R. Co.,* 6 Paige, 563. "The principles upon which the court should proceed in granting or refusing relief by injunction in cases of this kind are correctly laid down by Lord Brougham in the recent case of *The Earl of Ripon v. Hobert* (Cooper's Rep. temp. Brougham, 343). If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, where the complainant's right is not doubtful, without waiting for the result of a trial. But where the thing sought to be restrained is not in itself noxious, but only something which may, according to circumstances, prove to be so, the court will refuse to interfere,

until the matter has been tried at law by an action; though in particular cases the court may direct an issue, for its own satisfaction, where an action could not be brought in such a form as to meet the question."

It was not alleged that the operation of defendant's works authorized by the Legislature was in itself a nuisance, "but only something which may according to circumstances prove to be so," nor was it alleged that the right had been decided at law, and it is at least doubtful whether the facts stated, under the circumstances, made out such a case of irreparable mischief as required the judge, without reference to a trial at law, to grant the injunction. . . .

The judgment of this court is that the judgment of the Circuit Court be affirmed.

TURNER v. MIRFIELD.

COURT OF CHANCERY. 1865.

[34 *Beavan's Reports* 390.]

The object of this suit was to restrain a nuisance affecting the plaintiffs' property.

The defendant was the owner of a worsted mill near the plaintiffs' property. The nuisance complained of was of the following nature:—In the process of cleaning worsted before manufacturing it, it is washed with soap and caustic alkali, and the liquid used in such washing is afterwards curdled by mixing oil of vitriol with it. By these means, the greasy portion is caused to rise to the surface and is taken off, and the remainder of the liquid is refuse, and contains offensive substances, which emit a very strong and unwholesome stench, injurious to animals and men.

The defendant, in February, 1864, commenced draining this liquid into an old coal-pit on his lands, about forty yards from the plaintiffs' lands, and it found its way under ground into the plaintiffs' colliery, and caused sickness to the men and boys there, and seriously injured their health. It was first observed about the 15th of February, and a correspondence took place between the parties, which commenced on the 2nd of May, and ultimately this suit was instituted, on the 25th of June, 1864, praying an injunction to restrain the defendant "from transmitting or allowing to flow from his mill into the plaintiffs' land, or the mines in or under such land, the refuse fluid from his mill or any part of it, or any other water or fluid containing any filthy, noxious or offensive substance or materials."

The existence of the nuisance was, in the opinion of the Court, established.

Mr. *Hobhouse* and Mr. *Wickens* for the plaintiffs.

Mr. *Baggallay* and Mr. *Rigby* for the defendant.

The Master of the Rolls, [SIR JOHN ROMILLY]:

In defence, it is said, on behalf of the defendant, that the utmost that the Court can now do is, to direct an issue, and that the Court must either direct an issue to try whether there is a nuisance, or it must hear additional evidence, and determine the question of fact. I dissent from that argument, for I am of opinion that it is not necessary to adopt that course, except when there is some doubt on the mind of the Court as to the fact; but here I am satisfied that there is a nuisance, and that the plaintiffs are entitled to have it stopped.

It is alleged that the plaintiffs are not entitled to any injunction, because the bill was not filed until six months after the nuisance was perceived. This delay would be very material, in the case of an interlocutory application for an injunction, but it cannot have any bearing at the hearing of the cause. The plaintiffs are not applying for an interlocutory injunction, and they are entitled, at the hearing, to have their property protected for the future.

It is also objected, that there is some evidence to show that the suit is got up by Colonel Tempest, (a neighboring proprietor who had been affected by the nuisance), who, it is said, has indemnified one of the plaintiffs, and there is some proof of actual co-operation of Colonel Tempest. I am of opinion, that although that were established, it cannot bar the plaintiff from his right to have the nuisance discontinued.

The plaintiffs are entitled to a perpetual injunction in the terms of the prayer of their bill.

POLLOCK v. LESTER.

COURT OF CHANCERY. 1853.

[11 *Hare's Reports* 266.]

A motion for an injunction to restrain the defendant, his servants, workmen, and agents, from burning or causing to be burnt any bricks, on a certain piece of vacant ground belonging to him at North End, Fulham, so as to occasion damage or annoyance to the plaintiffs, Pollock, Pain, and A. R. & A. J. Sutherland, or any of them, as owners or occupiers, or owner or occupier of their respective dwelling houses, gardens, and pleasure grounds, or any of them, or injury or damage to the same dwelling houses, gardens, and pleasure grounds, or any of them.

The plaintiff Pollock was the lessee, under a lease for twenty-one years, of a house and pleasure grounds which he had occupied for four years and a half, and on the improvement of which he had expended a considerable sum of money.

The plaintiff Pain was a tenant from year to year of a dwelling-house and pleasure grounds adjoining the premises of Pollock, which he had occupied for upwards of seven years.

The plaintiffs, the Sutherlands, were doctors of medicine, and were the owners of a copyhold house, garden, and pleasure grounds abutting on the same premises, and which they had for many years used and occupied as an establishment for the reception of lunatic patients.

The defendant, being the proprietor of about an acre of ground opposite the plaintiffs' premises, and only separated therefrom by a high road, on which acre of ground, until 1852, stood a dwelling house called Grove Cottage, in the middle of that year pulled down such house, cut down the trees, and grubbed up the shrubs; and in May, 1853, caused to be dug up, on the ground thus made vacant, considerable quantities of earth for the purpose of making or burning bricks; and he subsequently caused a great quantity of bricks to be made of the earth so dug up, and he was preparing to burn the bricks, and had begun to form a clamp of bricks in a corner of the same ground, and placed there a considerable quantity of breeze and large ashes, and burnt bricks, to be used in such clamp for the purpose of firing and burning the same; when, after notice given to the defendant to abstain, the bill was filed, and the application for the injunction made.

The bill and affidavits stated that the clamp of bricks so begun to be formed was not more than sixty yards from the respective houses of Pollock and Pain, and not more than seventy-five yards from the grounds of the Drs. Sutherland; that Pollock had been for several months in bad health and was only now convalescent, and that it was absolutely necessary for his health that the air he breathed should be as pure as possible; and that there were twenty-eight patients in the Drs. Sutherlands' establishment, to whose recovery pure air and exercise in the gardens and pleasure grounds attached to the house was essential.

The bill and affidavits alleged that the burning of bricks on the said piece of ground would be a very great annoyance to the plaintiffs and to all the persons inhabiting their houses, and that great injury would accrue to the plaintiffs and to their dwelling houses, trees, shrubs, and plants; that the process of burning bricks in the manner intended by the defendant, which was the

ordinary mode of burning bricks, would give rise to a dense smoke, and acrid vapours, and blacks, and other floating substances, which would mix with and deteriorate the surrounding atmosphere; that Pollock would be compelled to quit his dwelling house, and in all probability many of the lunatic patients would be compelled to quit the Drs. Sutherland's establishment, the recovery of those who remained would be retarded, and the business and reputation of the establishment would be injuriously affected.

Mr. *Rolt* and Mr. *Jessel,* for the Plaintiffs, applied *ex parte* for an injunction.*

The VICE-CHANCELLOR, [SIR WILLIAM PAGE WOOD], after hearing the affidavits, said that the case was left exceedingly bare, and appeared to be founded entirely on conjecture. One case had decided that burning bricks within forty-eight yards of a dwelling house was a nuisance, but the distance in this case was considerably more; and there was no affidavit stating that any actual damage had been or must necessarily be suffered. The motion might stand over until the next seal, with liberty to file further affidavits.

Affidavits were subsequently filed, to the effect that the plaintiff Pollock and his wife had both suffered in their health from the noxious air which had been emitted from the burning bricks, and that the latter especially had been affected with nausea from that cause; and that they had been obliged to close and keep closed the doors and windows of their house, in order to exclude the corrupted air; and that the plaintiff Pain had also found like pain and inconvenience from the same cause; but there was no evidence of anybody having suffered in the establishment of the Drs. Sutherland.

On behalf of the defendant, affidavits were made by several persons residing in the immediate neighbourhood of the clamp of bricks which was in process of burning, and nearer thereto than the residences of the plaintiffs, and the deponents stated that they felt no inconvenience from the operation. It was, moreover, stated by affidavit that the defendant had obviated all danger of injury to health by using only pure earth, which had no noxious or deleterious qualities, and by avoiding altogether the use of chalk, from which sulphur would have been evolved.

. . .

The VICE-CHANCELLOR said: That although there might be some inconvenience in the state of the record where one or more of several plaintiffs, having several rights, failed in establishing

* The arguments of counsel are omitted.—*Ed.*

the claim asserted by the bill, and others succeeded, yet the Court was, by the Act 15 & 16 Vict. c. 86, s. 49, enabled to modify its decree, according to the circumstances of the case, without refusing relief to those who should prove to be entitled to it.

With regard to the question whether the injunction should be granted before any trial at law had taken place, it was a question of the amount of comparative inconvenience. Every case of alleged nuisance necessarily raised a mixed question of law and fact. Every trade and occupation, called into existence to supply the wants of civilized life, whether in the construction of dwellings or otherwise, must be lawfully carried on somewhere; and therefore, irrespective of the circumstances by which it was surrounded, it could not be pronounced a nuisance. The plaintiffs, to succeed, in a court of law, must prove first *damnum* and then *injuria*. The observation of Lord Eldon as to the case of the *Duke of Grafton v. Hilliard*, would seem to imply that he thought it doubtful whether brick burning, even carried on near dwellings, was legally a nuisance. That it is a nuisance under some circumstances was established by the decision of the Vice-Chancellor Knight Bruce in the case of *Walter v. Selfe*, and in this case there was positive evidence, on the affidavits, of the injurious effects which the operation complained of had produced on the state of health of two of the plaintiffs and members of their families; and the fact might also be adverted to, that the plaintiffs had been in the complete enjoyment of their homes, without any brick burning in the neighborhood, until these operations had been commenced.

The order was made to restrain the defendant from burning any bricks on the piece of ground in the pleadings mentioned, other than those which were actually burning in clamp, and not to continue such burning beyond a week from this day; the plaintiffs or any one of them, undertaking to proceed with their action at the present assizes for the county of Surrey, and to abide such order as the Court might make for payment of any damages which should arise to the defendant in consequence of the order.

MALONEY v. KATZENSTEIN.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION. 1909.

[120 *New York Supplement* 418.]

MCLAUGHLIN, J. Plaintiff is the owner of a four-story tenement house in the city of New York. The defendant for some years has been in possession of adjoining premises. The complaint alleges that for some years past defendant has been in the

habit of bringing upon his premises scrap meats, meat bones, fat, and refuse, which he sorted and left uncovered in barrels and otherwise, from which noxious odors were emitted, attracting flies, which carried with them disease and contagion, and by reason of which facts the value of plaintiff's premises had been greatly damaged. The judgment asked is an injunction restraining the continuance of the alleged nuisance, together with damages. Upon the complaint and affidavits in support of its allegations, the plaintiff obtained the order appealed from, which enjoins the defendant, during the pendency of the action, from bringing upon his premises and "from keeping, mixing, and sorting out, and allowing to be and remain thereupon, scrap meats, meat bones, fats, and refuse, and from causing and permitting the odor therefrom to penetrate into and about the building and premises of the plaintiff."

It appeared from the papers used in opposition to the motion that the defendant had carried on the same business upon the premises occupied by him for some 19 years, without objection or complaint from any source. The business carried on by the defendant, is not, in and of itself, unlawful, and it does not satisfactorily appear, when all of the papers used upon the motion are considered, that such business cannot be carried on without resulting in a nuisance. Yet the order appealed from absolutely prohibits the defendant from carrying on the business at all during the pendency of the action. This ought not to be done until after a trial of the issues be had, when the merits of the controversy can be investigated and determined. *Chamberlain v. Douglas,* 24 App. Div. 582, 48 N. Y. Suppl. 710; *Saal v. South Brooklyn Ry. Co.,* 122 App. Div. 364, 106 N. Y. Suppl. 996.

Not only this, but plaintiff's right to an injunction in any event is seriously disputed, and that is the issue which is involved in the action and necessarily must be determined after a trial. Injunctions *pendente lite,* "which, in effect, determine the litigation and give the same relief which it is expected to obtain by the judgment, should be granted with great caution, and only when necessity requires." *Bronk v. Riley,* 50 Hun. 489, 3 N. Y. Suppl. 446; *West Side El. Co. v. Consolidated Subway Co.,* 87 App. Div. 550, 84 N. Y. Suppl. 1052. Here no such necessity was shown. Plaintiff claims only $500 damages for the maintenance of the alleged nuisance during the past two years or more that he has been in possession of the adjoining premises, and there is no claim that the defendant is not and will not be responsible for any damages that may be recovered in the action. Under such circumstances, it cannot be said that the plaintiff

will be irreparably damaged if the defendant is permitted to continue his business until the action can be tried and the rights of the parties determined in the regular way. On the other hand, it might be a grave hardship, attended with great loss to the defendant, to be obliged to give up during the pendency of the action a business which he has carried on for something like 19 years.

The order appealed from therefore must be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. All concur.

HEPBURN v. LORDAN.

COURT OF CHANCERY. 1865.

[2 *Hemming and Miller's Reports* 345.]

This was a motion for injunction to restrain the defendants from bringing or permitting to remain damp jute on their premises, which adjoined the plaintiffs'.

The plaintiffs were the occupiers of tanning premises at Bermondsey, comprising about two acres, with ranges of buildings and sheds chiefly of wood. The stock and premises of the plaintiffs were insured for upwards of £70,000. The defendants had purchased about 2,000 tons of jute, which had been damaged and wetted at a fire, and on the 19th of December they began to remove the jute to a piece of ground separated from the plaintiffs' premises by a wooden fence, where they kept it partly in heaps of about thirty tons each, and partly spread out to dry, and were continuing their operations. The jute had heated in some places up to 130° Fahrenheit and gave out steam. One of the insurance offices in which the plaintiffs were insured had given notice that they considered the policies avoided by the proximity of the jute, but afterwards consented to treat them as in force for a limited time, and the plaintiffs anticipated having to pay an increased premium to the extent of £300 on renewing their policies. A fire engine was stationed on the premises at the instance of the offices. At an early period the plaintiffs had protested, and had been put off with a vague assurance that the jute was about to be removed.

On the part of the plaintiffs the evidence of experts and others was given to the effect that jute and other vegetable matters when damp were liable to spontaneous combustion, that jute was also very inflammable when dry, that this jute had been heating up to 130°, and that many recent fires had taken place where jute was stored. There was also further evidence by persons connected with insurance offices and the Fire Brigade as to the

danger to be apprehended. For the defendants, evidence of other experts was given to the effect that there was no well-authenticated instance of spontaneous combustion of jute after being imported into Europe, that a temperature of 980° must be reached before ignition would take place, that external wetting had never been known to cause spontaneous combustion, and that the only risk of spontaneous combustion was when the jute was fresh gathered, and in a green state. Evidence was also given that the damp jute on the defendants' premises would not take fire from a candle, and that great care was taken in turning it over and drying it as rapidly as possible.

A summons taken out before a magistrate by the plaintiffs under 7 & 8 Vict. c. 84, was dismissed on the 11th of January for want of jurisdiction.

Mr. *James*, Q. C., and Mr. *Winterbotham*, for the plaintiffs, moved for an injunction.

Mr. *Hind Palmer*, Q. C., and Mr. *Boyle*, for the defendants.*

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The case of *Reg. v. Lister* appears to my mind to meet this case so completely that I have now very little doubt, regard being had to that case, and to the circumstances of the present case, that an indictment would be sustainable in respect to the nuisance which the defendants are committing by bringing large quantities of inflammable materials upon their premises and so disposing of them as to create the greatest possible danger to the property which is immediately adjacent, as well as danger to the lives of all those who may be involved in the calamitous consequences of a fire.

The case is one of the strongest possible character that can be conceived as to danger. My only doubt was, how far the courts of law had gone with reference to acts of the character of those which the defendants have committed. The case is this, they have purchased 2,000 tons of a material called jute, which had been wetted at a fire. They have put it in heaps in its wet state upon property which adjoins that of the plaintiffs, and so close to that property that, as one of the witnesses says, if it had been placed for the express purpose of setting fire to the plaintiffs' property it could not have been more appropriately arranged. The defendants say that they intended to dry that material from time to time by spreading and turning it about the premises in question. They are taking, no doubt, as indeed they must take, great care to prevent the ignition of this material. They are taking, very properly, great care to prevent any light

* The arguments of counsel are omitted.—*Ed.*

being used, to prevent any work being done at night, and to prevent smoking. But what has happened with regard to this substance, jute? We have it upon evidence, not attempted to be contradicted, that within the last seven or eight years fires have taken place within the bills of mortality, not by spontaneous ignition of jute, but which have been of a most calamitous nature from the great difficulty of extinguishing it when once it is inflamed, and this very jute is part of other jute damaged at a fire. Other parcels have already occasioned fires, one in the month of December and the other in the month of January; and now the defendants have brought it close to the plaintiffs' property, which is property of considerable value, and is insured for about £80,000. One of the insurance offices, I suppose in consequence of some special condition in the policy, has given notice that it will consider the policy cancelled, and when the policies expire probably the offices will say that they will no longer continue them, except at higher premiums. It appears too, that in consequence of the undoubted character of this jute an engine is stationed there day and night for the purpose of doing the best that can be done in the event of any sudden combustion.

As to the question whether this material will spontaneously ignite, it seems far from certain that it will not, although there is no positive evidence that it will. I find it proved that jute will ignite if it is stacked green like hay. It is admitted that spontaneous ignition will then take place. It is not yet proved that it will spontaneously ignite when wetted after being brought to this country. Of course the principal cause of such ignition is the dampness of the jute. But there may be, and very probably is, a different chemical state of the article and a greater tendency to ignite when it is recently cut, and when there is more of the vital principle in it. That can only be proved by actual experience. But it appears that cotton, a material not altogether dissimilar, will, after it has arrived in this country, ignite. That seems upon the evidence undisputed. Dr. Taylor, who gives evidence upon this subject, very clearly and honestly, no doubt, says that he does not know of any well authenticated instance of spontaneous ignition of jute after being brought to Europe, though whether such combustion may not have occurred remains to a certain degree in doubt. But as regards the facility of ignition, and the enormous damage which ensues from the difficulty of extinguishing it when once ignited, we have the fact that a million and a half of property has been destroyed in seven years, and we have recently two fires occasioned by this very material.

The material question is, how far the defendants might or

not be indictable at common law. The only authority cited in the opening was the case about gunpowder, which was tried before Lord Eldon. I was anxious to know whether this had been extended to any other material, these being always questions of degree, though, *prima facie,* one would have said that a parity of reasoning should lead to a parity of decision.

The case I have now been referred to is a very recent case of *Reg. v. Lister,* which came before the Court of Criminal Appeal. The defendants had been indicted for that they unlawfully, knowingly, and willingly did deposit in a warehouse belonging to them, near to divers streets and highways, and divers dwelling-houses of her Majesty's subjects, divers large and excessive quantities of a dangerous, ignitable, and explosive fluid called wood-naphtha, and did keep in the said warehouse and near to the said streets, &c., the said fluid in such excessive and dangerous quantities, that the Queen's subjects passing along, &c., were in great danger of their lives and property and were kept in great alarm and terror.

From the language of Lord Campbell, who delivered the judgment of the Court, it appears that all those arguments which Mr. Palmer so very forcibly urged before me of the possible consequences of holding the warehousing of ignitable materials to be a nuisance were clearly before the Court, and did not prevail, and the danger in that case does not seem to me to go one whit beyond the danger of the material which I am now dealing with. Lord Campbell, after stating the indictment, says, "The indictment certainly does not state that any noxious effluvia issued from the naphtha, or that the air was corrupted by it, or that any bodily harm was done to any of the Queen's subjects, but we conceive that to deposit and keep such a substance in such quantities in a warehouse so situate to the danger of the lives and property of the Queen's subjects is an indictable offense. The law of the country would be very defective if life and property could be so exposed to danger by the act of another with impunity. There is no ground for saying that according to the doctrine contended for by the prosecutors' counsel, neither brandy, nor wine, nor oil, nor any ignitable substance, could be kept in the cellar of a town house without the owner of the house being liable to fine and imprisonment. The substance must be of such a nature, and kept in such large quantities, and under such local circumstances as to create real danger to life and property. The well founded apprehension of damage which would alarm men of steady nerves and reasonable courage passing through the street in which the house stands, or residing in adjoining houses,

is enough to show that something has been done which the law ought to prevent by pronouncing it to be a misdemeanor. Accordingly to manufacture or to keep in large quantities in towns or closely-inhabited neighbourhoods, gunpowder, (which for this purpose cannot be distinguished from naphtha), is by the common law of England, a nuisance and an indictable offense. The doctrine is to be found in almost all our treatises on Crown law, and it was acted upon in *Rex v. Taylor, Roger Williams' Case,* and *Crowder v. Tinkler.* We are next to consider whether the facts found by the jury in this case were sufficient to support this indictment. The jury found that naphtha is very inflammable, more so than spirits, and even more than gunpowder itself, passing into vapour at a heat of 140° Fahrenheit, and if inflamed, water could not put out the fire arising from it unless the water were applied in enormous proportions relatively to the quantity of inflamed naphtha; and that without dispute a fire arising and communicating with the quantity kept upon these premises could not be quenched, and would produce very disastrous consequences in the neighbourhood."

I think every word of that will apply to this case. I do not find that Dr. Taylor or anybody else says that if a fire arose from this large quantity of jute, it could be put out before there was a total destruction of the plaintiff's property. If the plaintiff's property is in danger, and other property there situate, and if the offense be indictable, he is entitled to come here for the assistance of this Court. But at the same time I think I must put him under terms of bringing an indictment at once. I have simply to balance the question of damage in the interim. That the damage to the plaintiff must preponderate to justify an interim injunction is a settled rule, but nobody can question that the expense of moving this quantity of jute is not to be compared to the expense of £80,000 of damage, which will be done to the plaintiff if a fire takes place.

Now it is said that this is a mandatory injunction. I do not think that I should feel great difficulty in a case of this description even if it were so; but it should be observed that the jute has for the most part been brought to the defendant's premises after distinct protest met by a statement that the jute was about to be removed. I do not think that the distinct and positive averment of the plaintiff in the bill and upon the affidavits is met by that species of denial which I find here, the defendants not denying distinctly, but saying they did not tell the plaintiffs this, but only that they meant to remove the jute as it was dried *de die in diem.*

One argument which I ought to notice is, that this jute has lain there so long without causing danger. In consequence of that I think that some reasonable time ought to be given for removing it. The danger appears to be not whilst it is damp, but when it is approaching a dry state. Then is the moment of very serious danger to all persons who may be concerned. I may take it, I think, that whilst it is actually wet it will not ignite, or that if it did the fire would not spread with the same force as when it is dry. The case of hardship to the defendant is much less strong than that in the Queen's Bench, which was a case of warehousing in the common course of business. But here the defendants hired the premises for the purpose when they might have hired any field in the vicinity of London, or might have taken the jute to some open space not surrounded by houses. But they chose to carry it to this densely-populated neighbourhood, a place upon which I have a very strong inclination of opinion (though that will have to be determined upon the indictment) that they were not entitled to deposit it, not for warehousing or for manufacturing, but for their own convenience, namely, to dry an extremely dangerous and inflammable material. I think therefore that there must be an injunction to restrain these defendants.

Injunction to restrain defendants from allowing the damp jute now on the defendants' premises from remaining there, or bringing any damp jute there in such quantity as to occasion danger to the plaintiff's adjoining property, till the hearing or further order. Defendants to have a fortnight to remove the jute, the plaintiffs undertaking to proceed forthwith with the indictment of the defendants in respect of the nuisance complained of, and to abide by any order as to damages.

RICHARDS'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1868.

[57 *Pennsylvania State Reports* 105.]

* The opinion of the court was delivered Feb. 3d, 1868, by THOMPSON, C. J. The complainant in this case is the owner of a dwelling-house and cotton factory in the village of Phoenixville, Chester county; and the respondents are owners of very extensive iron works in the same village. The former complains that by reason of the kind of fuel used by the latter in their works, his residence is rendered uncomfortable and unwhole-

* The master's report, the opinion of the lower court, and the arguments of counsel on appeal are omitted.—*Ed.*

some, and his factory materially injured in the discoloration of his fabrics and deterioration of his machinery. Claiming that he had established this, he asked the court below for a perpetual injunction to restrain the respondents from using the fuel, bituminous and semi-bituminous coal complained of as the cause of the injury to his property, in these furnaces. The case was heard on bill and answer, and the court decided against him. He was then permitted to file a replication and take testimony, on which there is a report of a master also against him. The court having sustained the report, again refused to enjoin the defendants, and the case is before us on an appeal, and we are asked to do what the court below refused, namely, perpetually to restrain the defendants from using bituminous or semi-bituminous coal in their furnaces.

The defendants' works are very extensive, amongst the most so, it is said, of any of the kind in the Commonwealth, consisting of several blast furnaces, some seventy puddling furnaces, and rolling mills, and other machinery. They began on a small scale some forty-nine or fifty years ago, and up to 1840 used bituminous coal exclusively. The original works were not precisely on the spot of those complained of, but so near it as to entitle the latter to be regarded as an extension of the former. The extensions made in the works in 1837, 1846 and 1853, constitute the present works, the cost of which alone is represented as exceeding half a million of dollars, and which at the time of taking the testimony, and previously, employed, as the master reports, from eight hundred to one thousand hands.

The plaintiff's dwelling, it appears, is situated on a bluff or hill northwardly from the defendants' works, about seventy feet above the nearest furnace floor, which brings its first story about on a level with the top of the puddling-stacks, and when the wind is towards the plaintiff's house and from the furnace, the consequence is, that it is at times enveloped in a coal-smoke thrown out of the chimneys of the puddling furnaces. It cannot be doubted, I think, that this materially operates to injure the dwelling-house as a dwelling, and consequently to deteriorate its value. The alleged injury to the factory is mainly that the smoke and soot of the furnaces blackens the stock and renders the fabrics less salable. This I can readily understand and believe. The house was erected in 1829 and the factory in 1834, and both have been generally occupied ever since; the factory not doing full work for some time past, as the master reports.

A careful consideration of the testimony satisfies us that the use of semi-bituminous coal, the fuel complained of, is necessary to the successful manufacture of iron fit for axles, cannon

and the like, in the manufacture of which the defendants are largely engaged; that the process of manufacture, and fuel used, are generally employed in similar establishments, and that there was neither a negligent nor wilful infliction of injury upon the plaintiff or his property in the defendants' mode of operating their works. Whatever of injury may have, or shall result to, his property from the defendants' works, by reason of the nuisance complained of, is such only as is incident to a lawful business conducted in the ordinary way, and by no unusual means. Still there may be injury to the plaintiff; but this of itself may not entitle him to the remedy he seeks. It may not, if ever so clearly established, be a case in which equity ought to enjoin the defendants in the use of a material necessary to the successful production of an article of such prime necessity as good iron; especially if it be very certain that a greater injury would ensue by enjoining than would result from a refusal to enjoin. If we were able with certainty to say that the use of semi-bituminous coal, in the process of making good iron by the puddling process, was unnecessary, and other fuel was equally good and available, or that by a reasonable expenditure of money on the works, all injury might be avoided, a different case might appear to our minds as chancellors, and we might then say that the cause of injury should cease, and that a decree in terms to meet such a contingency should be made so as to prevent the injury. But we have not such case before us. Bituminous, or at least semi-bituminous coal, we think from the testimony, is necessary in the manufacture of iron, such as the business of the defendants requires, and whose fabrics [products?] the public require. Nor are we shown by testimony or reliable tests of any kind, that the smoke produced in the puddling process can be consumed, as it undoubtedly may be in ordinary chimneys, or when produced in furnaces used to propel machinery. I am personally cognisant that this may be done from observation both in this country and in England; and I have therefore read with satisfaction and entire conviction of the truth, the article from the London Quarterly of 1866, so largely quoted by the learned counsel for the appellants; but I would be very unwilling to act on that conviction or that theory any further than to the extent to which experiment has gone. I would require very clear proof of the practicability of the application of the principle to uses dissimilar, or partially so, as puddling chimneys from common furnace smoke-stacks. The defendants seem willing to test the applicability of smoke consumers to puddling furnaces, and at the same time express their doubts in a practical shape by offering $50,000 for an invention which will con-

sume the smoke of their puddling stacks without impairing the efficiency of the process of manufacturing iron. However this may be, certain it is, we are not able to say from anything shown, that the evil complained of can be remedied by the application of smoke consumers. We do not know what effect their application might have on the process; nor do we think we should visit the defendants, because they might be unwilling to add to the height of their chimneys without knowing what effect it would have, or because they might not be willing to tear down their establishment and re-erect it on Seiman's plan or patent. What effect these remedies, or either of them ought to have on the mind of a chancellor, if feasible, and the injury complained of were absolutely irreparable, we are not called upon to say, for such is evidently not the case here if there be any damage at all, as we shall presently show.

The rule on this subject is well stated in *Grey v. The Ohio and Pennsylvania Railroad Co.*, 1 Grant, 412, thus: "Where damages will compensate either the benefits derived or the loss suffered from a nuisance, equity will not interfere." See also Hilliard on Injunc. 271; Adams' Eq. 485; Fonblanque's Eq. 51; 2 Story's Eq. sec. 925, *et seq.;* Eden on Injunc. 269. In *Coe v. Lake,* 37 N. H. 254, it was said, where the bill prayed an injunction to suppress a nuisance to the plaintiff's land, it might be dismissed on general demurrer for want of equity, unless it appeared from the subject-matter affected by the alleged nuisance that there was danger of irreparable mischief, or of an injury such as could not be adequately compensated in a suit at law. These, and many other authorities to the same effect, some of which are on the paper-book of the appellees, prove conclusively that, as a general rule, mischief or damage is not irreparable which is susceptible of being compensated in damages. We have no doubt that an action at law will lie for an injury to property for causes similar to those mentioned in this bill, and if so, why will not the remedy be adequate in such case, and thus the injury be repaired in damages? We are not to presume that it will not be. This would be to impugn the justice of our common-law forms without reason. We think, under the circumstances of the case, that the injunction ought to be refused, and the plaintiff left to his action at law for the recovery of such damages as he may have sustained or may sustain.

An error seems somewhat prevalent in portions, at least, of this Commonwealth, in regard to proceedings in equity to restrain the commission of nuisances. It seems to be supposed that, as at law, whenever a case is made out of wrongful acts on the one side and consequent injury on the other, a decree to restrain

the act complained of, must as certainly follow, as a judgment would follow a verdict in a common-law court. This is a mistake. It is elementary law, that in equity a decree is never of right as a judgment at law is, but of grace. Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience the former should appear he will refuse to enjoin: *Hiltio v. The Earl of Granville,* 1 Craig & Ph. Ch. R. 292; *Grey v. The Ohio and Penna. Railroad Co., supra.* We think this is a safe rule, and that the case we are considering is within it. With these views, and on full consideration of all the testimony in the case, we are of opinion the injunction was properly refused in the court below, and that the decree dismissing the plaintiff's bill with costs must be affirmed.

Appeal dismissed at the cost of appellant.

HULBERT v. CALIFORNIA CEMENT COMPANY.

SUPREME COURT OF CALIFORNIA. 1911.

[161 *California Reports* 239.]

MELVIN, J. Petitioner has made an original application to this court to suspend the operation of a certain injunction until the decision of the appeals in two cases, in each of which the California Portland Cement Company, a corporation, is the defendant, on the ground that the property of the corporation would be so greatly damaged by the operation of the injunction pending the appeals, that a judgment in defendant's favor would be almost fruitless, while, it is contended, the damage to plaintiff is easily susceptible of satisfaction by a payment of money. Petitioner offers to furnish any bond this court may require if the order which is prayed for shall be granted. As this was the first case in America, so far as this court knew, in which the operation of a cement plant had been enjoined because of the dust produced in the processes of manufacture, and as the showing which was made indicated that petitioner's loss would be very great if the injunction were enforced at once, an order was entered temporarily staying its operation until both sides to the controversy could be heard. The court was moved somewhat to such action also because the trial court had made an order staying the operation of the injunction for sixty days, so that this court might have the opportunity of passing upon this application. Two principal questions are presented: 1. Has the supreme court the authority in aid of its appellate jurisdiction under section 4 of article VI of the constitution to suspend the

operation of an injunction pending appeal? 2. If it has such power is this a proper case for the exercise thereof? Owing to the conclusion which we have reached it is unnecessary to answer the first question authoritatively because assuming a reply to it in the affirmative, we cannot say that the facts of this case warrant any other response to the second inquiry than a negative one.

The salient facts shown by the petitioner are that the California Portland Cement Company is engaged in the manufacture of cement on property situated nearly two miles from the center of the city of Colton in the county of San Bernardino, but not within the limits of said city; that said manufactory is located at Slover Mountain, where the substances necessary to the production of Portland cement are quarried; that long before the surrounding country had been generally devoted to the production of citrus fruits, Slover Mountain had been known as a place where limestone was produced; that quarries of marble and limestone had been established there; that lime kilns had been operated upon said mountain for many years; that in 1891 the petitioner obtained title to said premises and commenced thereon the manufacture of Portland cement; that the said corporation has expended upon said property more than eight hundred thousand dollars; that at the time when petitioner began the erection of the cement plant the land surrounding the plant was vacant and unimproved, except some land lying to the north, which had been planted to young citrus trees; that these trees were first planted about a year before the erection of the cement plant was commenced (but long after the lime kilns and the marble quarries had been operated); that subsequently, other orange groves had been planted in the neighborhood; that petitioner's plant on Slover Mountain has a capacity of three thousand barrels of cement per day; but that by the judgment of the superior court in two certain actions against petitioner entitled Lillie A. Hulbert, Administratrix etc., v. California Portland Cement Co., a corporation, and Spencer E. Gilbert, plaintiff, v. the same defendant, the corporation aforesaid was enjoined from operating its plant in such manner as to produce an excess of 88,706 barrels of finished cement per annum; that the regular pay-roll of the company includes the names of about five hundred men who are paid about thirty-five thousand dollars a month; that the fixed, constant monthly expenses for supplies and materials amount to thirty-five thousand dollars; that the California Portland Cement Company employs the best, most modern methods in its processes of manufacture, but that nevertheless there is an unavoidable escape into the air of certain dust and smoke; that peti-

tioner has no other location for the conduct of its business at a profit; that the land of the Hulbert estate is located from fifteen hundred to twenty-five hundred feet from petitioner's cement works and that Spencer E. Gilbert's land is all within one thousand feet therefrom; that petitioner has diligently sought some means of preventing the escape of dust from its factories; that it has consulted the best experts and sought the best information obtainable, and that it is now and has been for a long time conducting experiments along the lines suggested by the most eminent engineering authorities upon this subject, and that as soon as any process can be evolved for preventing the escape of the dust, the petitioner will adopt such process in its works, and it is believed that a process now constructing with all diligence by petitioner will effectually prevent the escape of dust. Petitioner also alleges that it is easily possible to estimate the damages of the plaintiffs in money while it is utterly impracticable to estimate the damage in money which will be caused to the petitioner by the closing of the plant, and that stopping the plant pending the appeals will cause financial ruin to the chief stockholders of the petitioner, and that the elements of loss averred are irreparable on account of the disorganization of petitioner's working force, loss of market, and deterioration of machinery.

The learned judge of the superior court in deciding the cases in which petitioner here was defendant, described the method of manufacturing cement and the injury to the trees. He said, in part: "The output from these two mills at the present time is about 2500 barrels of cement every twenty-four hours, and to produce this there is fed into the various kilns of the defendant, during the time mentioned, about one and one-half million pounds of raw mix, composed of limestone and clay, ground as fine as flour and thoroughly mixed. This raw mix is fed into the tops of kilns, wherein the temperature varies from 1800 to 3000 degrees Fahrenheit, and through which kilns the heated air and combustion gases pass at the rate of many thousands of feet per minute. The result of this almost inconceivable draft is to carry out, in addition to the usual products of combustion, particles of the raw mix, to the extent of probably twenty tons per day or more, the greater part of which, without question, is carried up into the air by the rising gases, and thereafter, through the action of the winds and force of gravity, distributed over the surrounding territory." Speaking of the premises of the plaintiffs he said that because of prevailing westerly winds and on account of the proximity of the mills said lands were almost continually subject to the deposit of dust. In this regard he said: "It is the fact, incontrovertibly established by both the testimony of wit-

nesses and personal inspections made by the court that a well-nigh continuous shower of cement dust, emanating from defendant's cement mills and caused by their operation is, and for some years past has been, falling upon the ground, filtering through their homes, into all parts thereof, forming an opaque semi-cemented encrustation upon the upper sides of exposed flowers and foliage, particularly leaves of citrus trees and leaving ineradicable, yet withal plainly discernible marks and evidence of dust, dusty deposits, and grayish colorings resulting therefrom, upon the citrus fruits. The encrustations above mentioned, unlike the deposits occasionally occurring on leaves because of the presence of undue amounts of road dust or field dust, are not dissipated by the strongest winds, nor washed off through the action of the most protracted rains. Their presence, from repeated observations, seems to be as continuous as their hold upon the leaves seems tenacious." The court further found that the deposit of dust on the fruit decreased its value; that the constant presence of dust on the limbs and leaves of the trees rendered the cultivation of the ground and the harvesting of the crop more costly than it would have been under ordinary conditions; and that said dust added to the usual and ordinary discomforts of life by its presence in the homes of the plaintiffs. The court also found that the operation of the old mill of the defendant corporation had occurred with the acquiescence of the plaintiffs and that the defendant had acquired a prescriptive right to manufacture the maximum quantity of cement produced annually by that factory.

In view of such facts solemnly found by the court after trial, we cannot say that there is reason for a suspension by this court of the injunction, even conceding that we have power under proper circumstances thus to prevent a disturbance of existing conditions, pending an appeal. We are not insensible to the fact that the petitioner's business is a very important enterprise; that its location is peculiarly adapted for the manufacture of cement; and that great loss may result to the corporation by the enforcement of the injunction. Even if the officers of the corporation are willing to furnish a bond in a sum equal to the value of the properties of Gilbert and of the Hulbert estate here involved, we can not, under plain principles of equity, compel these plaintiffs to have recourse to their action at law only and take from them the benefit of the injunctive relief accorded them by the chancellor below. To permit the cement company to continue its operations even to the extent of destroying the property of the two plaintiffs and requiring payment of the full value thereof would be, in effect, allowing the seizure of private property for

a use other than a public one—something unheard of and totally unauthorized in the law. (*Hennessy v. Carmony,* 50 N. J. Eq. 616, [25 Atl. 374]; *Sullivan v. Jones & Laughlin Steel Co.,* 208 Pa. 540, [57 Atl. 1065, 66 L. R. A. 712].) Nor may we say, as petitioner urges us to declare, that cement dust is not a nuisance and therefore that the restraint imposed is illegal, even though this is one of the first cases, if not the very first, of its kind, in which the emission of cement dust from a factory has been enjoined, for we are bound by the findings of the court in this proceeding and may not consider their sufficiency or lack of it until we take up the appeals on their merits. The court has found that the plaintiffs in the actions tried were specially damaged by a nuisance maintained by the cement company. This entitles the plaintiffs not only to damages, but to such relief as the facts warrant, and the chancellor has determined that limiting the production in the manner selected is a proper form of protection to their rights. It is well settled in California that a nuisance which consists in pouring soot or the like upon the property of a neighbor in such manner as to interfere with the comfortable enjoyment of the premises is a private nuisance which may be enjoined or abated, and for which likewise, the persons specially injured may recover pecuniary damages. (Code Civ. Proc., sec. 731; *Fisher v. Zumwalt,* 128 Cal. 493, [61 Pac. 82]; *Melvin v. E. B. & A. L. Stone Co.,* 7 Cal. App. 328, [94 Pac. 390]; *Judson v. Los Angeles Sub. Gas Co.,* 157 Cal. 169, [26 L. R. A., (N. S.) 183, 106 Pac. 581].) The last-named case was one in which the operation of a gas factory had been enjoined and the following language was used: "A gas factory does not constitute a nuisance *per se.* The manufacture in or near a great city of gas for illuminating and heating is not only legitimate but is very necessary to the comfort of the people. But in this, as in any other sort of lawful business, the person conducting it is subject to the rule *sic utere tuo ut alienum non laedas,* even when operating under municipal permission or under public obligation to furnish a commodity. (*Terre Haute Gas Co. v. Teel,* 20 Ind. 131; *Attorney-General v. Gas-light & Coke Co.,* L. R. 7 Ch. Div. 217; *Sullivan v. Roger,* 72 Cal. 248, [13 Pac. 655].) Nor will the adoption of the most approved appliances and methods of production justify the continuance of that which, in spite of them, remains a nuisance. (*Evans v. Fertilizing Co.,* 160 Pa. St. 223, [28 Atl. 702]; *Susquehanna Fer. Co. v. Malone,* 73 Md. 276, [25 Am. St. Rep. 595, 20 Atl. 900, 9 L. R. A. 737]; *Susquehanna Fer. Co. v. Spangler,* 85 Md. 562, [63 Am. St. Rep. 533, 39 Atl. 270].)"

Petitioner contends for the rule that the resulting injuries must be balanced by the court and that where the hardship inflicted upon one party by the granting of an injunction would be very much greater than that which would be suffered by the other party if the nuisance were permitted to continue, injunctive relief should be denied. This doctrine of "the balance of hardship" and the associated rule that "an injunction is not of right but of grace" are the bases of petitioner's argument, and many authorities in support of them have been called to our attention. In petitioner's behalf are cited such cases as *Richards's Appeal,* 57 Pa. St. 105, [98 Am. Dec. 202], where an injunction which had been sought to restrain defendant from using large quantities of bituminous coal to plaintiff's damage was refused, and the plaintiff was remitted to his action at law, the court saying, among other things: "Whatever of injury may have or shall result to his, the plaintiff's property, from the defendant's works, by reason of a nuisance complained of, is only such as is incident to a lawful business conducted in the ordinary way and by no unusual means. Still there may be injury to the plaintiff, but this of itself may not entitle him to the remedy he seeks. It may not, if ever so clearly established, be a cause in which equity ought to enjoin the defendant in the use of a material necessary to the successful production of an article of such prime necessity as good iron; especially if it be very certain that a greater injury would ensue by enjoining than would result by refusal to enjoin." The same rule was announced in *Dillworth's Appeal,* 91 Pa. St. 248, a case involving the building of a powder house near plaintiff, and in *Huckenstine's Appeal,* 70 Pa. St. 102, [10 Am. Rep. 669]. Petitioner admits that in the later case of *Sullivan v. Jones & Laughlin Steel Co.,* 208 Pa. St. 540, [57 Atl. 1065, 66 L. R. A. 712], the supreme court of Pennsylvania reached a different conclusion, but contends that the opinion in that case merely defines the word "grace" as used in *Huckenstine's Appeal,* the real meaning of the expression "an injunction is a matter of grace" being that a high degree of discretion is exercised by a chancellor in awarding or denying an injunction. An examination of the case, however, shows that the court went very much further than a mere definition of the phrase "of grace." In that case the defendant had erected a large factory for the manufacture of steel on land purchased from one of the plaintiffs, but after many years defendant had commenced the use of "Mesaba" ore, which caused the emission of great quantities of fine dust upon the property of plaintiffs. The supreme court of Pennsylvania in reversing the decree of the lower court dismissing the bill went into the matter of "balancing injuries,"

and "injunctions of grace" very thoróughly and we may with propriety, I think, quote and adopt some of its language upon these subjects as follows:—"It is urged that as an injunction is a matter of grace, and not of right, and more injury would result in awarding than refusing it, it ought not to go out in this case. A chancellor does act as of grace, but that grace sometimes becomes a matter of right to the suitor in its court, and, when it is clear that the law cannot give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them. This is too often overlooked when it is said that in equity a decree is of grace, and not of right, as a judgment at law. In *Walters v. McElroy, et al.*, 151 Pa. St. 549 [25 Atl. 125], the defendants gave as one of the reasons why the plaintiff's bill should be dismissed, that his land was worth but little, while they were engaged in a great mining industry which would be paralyzed if they should be enjoined from a continuance of the acts complained of; and the principle was invoked that, as a decree in equity is of grace, a chancellor will never enjoin an act where, by so doing greater injury will result than from a refusal to enjoin. To this we said: The phrase 'of grace,' predicated of a decree in equity, had its origin in an age when kings dispensed their royal favours by the hands of their chancellors; but although it continues to be repeated occasionally, it has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. It has been somewhere said that equity has its laws, as law has its equity. This is but another form of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace, of the chancellor. Certainly no chancellor in any English speaking country will at this day admit that he dispenses favours or refuses rightful demands, or deny that when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable *ex debito justitiae*, and needs not to be implored *ex gratia*. And as to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest

difference that the plaintiff's property is of insignificant value to him as compared with the advantages that would accrue to the defendants from its occupation. There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land. Though it is said a chancellor will consider whether he would not do a greater injury by enjoining than would result from refusal and leaving the party to his redress at the hands of a court and jury, and if, in conscience, the former should appear, he will refuse to enjoin, (*Richards's Appeal,* 57 Pa. St. 105, [98 Am. Dec. 202]); that 'it often becomes a grave question whether so great an injury would not be done to the community by enjoining the business that the complaining party should be left to his remedy at law,' (*Dillworth's Appeal,* 91 Pa. St. 248); and similar expressions are to be found in other cases; 'none of them, nor all of them, can be authority for the proposition that equity, a case for its cognizance being otherwise made out, will refuse to protect a man in possession and enjoyment of his property because that right is less valuable to him than the power to destroy it may be to his neighbor or the public.' (*Evans v. Reading Chem. Fer. Co.,* 160 Pa. St. 209, [28 Atl. 702].) The right of a man to use and enjoy his property is as supreme as his neighbor's and no artificial use of it by either can be permitted to destroy that of the other."

Petitioner lays great stress upon *North Fork Water Co. v. Medland,* 187 Fed. 169, in which in the opinion of Judge Ross, formerly a member of this court, the following appears: "Now in the first place, it is to be remembered that no one is entitled to an injunction as a matter of absolute right. When a contract is broken and any party thereto sustains an injury by reason of such breach, the injured party has an absolute right to maintain an action at law for the recovery of such damages as can be shown to have been sustained by him. But a suit in equity either to enjoin the continuance of such a breach or to enforce the specific performance of the contract appeals to the sound discretion of the chancellor—to his conscience—and the relief so sought will be granted or withheld according to the real equity of the case, in view of all its facts and circumstances." Petitioner also cites *Mountain Copper Co. v. United States,* 142 Fed. 625, [73 C. C. A. 621], in which the opinion was also by Judge Ross. In that case the court refused to enjoin the operation of defendant's smelter, relying largely upon the early cases from Pennsylvania which declare the "balance of hardship" doctrine

and that an injunction is *ex gratia* and not *ex debito justitiae*, and citing other cases including the well known *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, [83 S. W. 658]. While we have the utmost respect for the learned author of these opinions and for the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, we cannot agree with the principles announced in the two cases decided by that court cited above. In connection with the case of *Mountain Copper Co. v. United States*, 142 Fed. 625, [73 C. C. A. 621], it is interesting to note that in his dissenting opinion therein Judge Hawley quotes from *Fisher v. Zumwalt*, 128 Cal. 493, [61 Pac. 82], and two other Californian cases, *Daubenspeck v. Grear*, 18 Cal. 445, 447, and *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 544, 551, and after an analysis of them concludes with this brief but excellent statement of the rule which he deduced from them: "The pith, point, and substance of this whole matter is that where the acts of a party, whether individuals or corporations, wealthy or poor, destroy the substance of complainant's estate, whether it be of great or of but little value, an injunction should be issued. This is the underlying principle, the essence and effect of all the decisions upon the subject which distinguish this character of cases from those where the injury is slight and trivial and the damage not irreparable and not absolutely destructive of complainant's estate."

The Mountain Copper Company case has also been criticized by the supreme court of Arizona, as well as the later case of *McCarthy v. Bunker Hill & Sullivan Mining & Con. Co.*, 164 Fed. 927, [92 C. C. A. 259]. In *Arizona Copper Co. v. Gillespie*, 12 Ariz. 203, [100 Pac. 470], this language was used: "Counsel press upon us the proposition that we should consider the comparative damage that will be done by granting or withholding an injunction in this case, alleging that the effect of an injunction will be to stop the operation of extensive works, deprive thousands of persons of employment, and cause loss and distress to other thousands. It is undoubtedly true that a court should exercise great care and caution in acting where such results would follow. It should very clearly appear that the acts of the defendant are wrongful, and that the complainant is suffering substantial and irreparable injury, for which he cannot secure adequate compensation at law. A number of eminent courts support the contention of appellant that the comparative injury to the parties in granting or withholding relief must also be considered. Among the cases so holding is the case of *McCarthy v. Bunker Hill & Sullivan Mining & Con. Co.*, 164 Fed. 927, [92 C. C. A. 259], decided by the Circuit Court of Appeals

for this circuit, a court for which we entertain the highest respect, (which exercises an appellate jurisdiction over this court in certain cases); and, if this case were reviewable there, we should not feel at liberty to express our views in conflict with those of that court. But this case is reviewable only by the Supreme Court of the United States, and we cannot find, as suggested by the Circuit Court of Appeals, that that court has given adherence to the doctrine. It seems to us that to withhold relief where irreparable injury is, and will continue to be, suffered by persons whose financial interests are small in comparison to those who wrong them is inconsistent with the spirit of our jurisprudence. It is in effect saying to the wrong-doer, 'If your financial interests are large enough so that to stop you will cause great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors.' We prefer the doctrine adhered to by Judge Hawley in his dissenting opinion in *Mountain Copper Co. v. United States,* 142 Fed. 625, [73 C. C. A. 621], and by Judge Sawyer in *Woodruff v. North Bloomfield Gravel Min. Co.,* 18 Fed. 753. In the latter case it is said: 'Of course great interests should not be overthrown on trifling or frivolous grounds, as where the maxim *de minimis non curat lex* is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all small and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency.' To the same effect are the remarks of Judge Marshall in *McCleery v. Highland Boy Gold Min. Co.,* 140 Fed. 951."

Petitioner cites, among others, the following cases, which, although tending for the most part to support the rule for which he contends, are not we think in accord with the best modern ideas upon this subject and with the current of Californian authorities: *McBryde v. Sayre,* 86 Ala. 458, [5 South. 791, 3 L. R. A. 861]; *Chambers v. Iron Co.,* 67 Ala. 358; *Clifton Iron Co. v. Dye,* 87 Ala. 468, [6 South. 192]; *Reideman v. Mt. Morris Elec. Co.,* 56 App. Div. 23, [67 N. Y. Suppl. 391]; *Barnard v. Sherley,* 135 Ind. 547, [41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568]; *Gilbert v. Showerman,* 23 Mich. 449; *Lloyd v. Catlin Coal Co.,* 210 Ill. 460, [71 N. E. 335]; *Amelia*

Mill Co. v. Tenn. Coal & Iron Co., 123 Fed. 811; *Edwards v. Allouez Min. Co.*, 38 Mich. 46, [31 Am. Rep. 301]; *Atchison v. Peterson*, 20 Wall. 507, [22 L. Ed. 414], and *Stewart Wire Co. v. Lehigh C. & N. Co.*, 203 Pa. St. 474, [53 Atl. 352]. The last-named case was really decided upon the doctrine of laches and not that of "balance of detriment." Many of the cases to which our attention is called by petitioner are not strictly in point. For example, in *New York City v. Pine*, 185 U. S. 93, [22 Sup. Ct. 592, 46 L. Ed. 820], the supreme court of the United States recognized the principle that, where the defendant in an injunction suit has "the ultimate right," that is to say, where it is entitled to continue with its work by eminent domain proceedings, a permanent injunction will be denied, but a temporary injunction may be granted to compel the defendant to make compensation.

In *Georgia v. Tenn. Copper Co.*, 206 U. S. 230, [27 Sup. Ct. 618, 51 L. Ed. 1038], there is a dictum to the effect that if the plaintiff were a private individual the court might consider the balance of hardship, but from this Harlan, J., dissented. One of the most instructive cases upon this subject is *American Smelting & Ref. Co. v. Godfrey*, 158 Fed. 225, [89 C. C. A. 139]. In that case Judge Riner says: "The fact, urged by counsel, that these smelters are located at a place where by reason of its relation to the railroads and mines is most convenient for smelting purposes does not, in our judgment, constitute any defense to a bill to abate a nuisance, neither can a court take into consideration the fact that the business is conducted in a proper and reasonable manner employing the latest and best devices and instrumentalities, where the evidence shows, as in this case, that when so operated and conducted, it still results in very great damage to, if not the total destruction of, complainant's property, and is a menace to health. 'The rights of habitation are superior to the rights of trade, and whenever they conflict, the rights of trade must yield, to the primary or natural right.' (1 Wood on Nuisances, secs. 514-17 and 23.) It is also insisted that the injury to the appellants and to the public if an injunction issues, so greatly exceeds the injury to the appellees if denied, that an injunction should not have been granted. We think it may well be doubted whether this statement is supported by the record. The parties to this suit, upon both sides, have important and very valuable interests affected by the decree, and it would indeed be difficult to say upon the facts disclosed by the record, which side would suffer the greater injury. However that may be, we do not think the fact that an actual injury resulting from the violation of a right is small, and the interest

to be affected by an injunction is large, should weigh against the interposition of preventive power in equity, when it is clear that on one hand a right is violated and on the other a wrong is committed." He then discusses the leading cases. This and the appended opinion of Marshall, district judge, rendered in the circuit court, are very illuminating.

Our attention has been directed to certain Californian cases which, according to petitioner's belief, support the rule with reference to the "balancing of injury." These are *Peterson v. City of Santa Rosa,* 119 Cal. 387, [51 Pac. 557], and *Williams v. Los Angeles Railway Co.,* 150 Cal. 593, [89 Pac. 330]. In the latter case the court was considering the refusal by the superior court of an injunction *pendente lite.* While it contains some language perhaps susceptible of the meaning for which petitioner contends, the court was really considering the principle announced in *Hicks v. Michael,* 15 Cal. 116, that an injunction should not be issued before a hearing on the merits except in cases of urgent necessity. In *Peterson v. Santa Rosa,* 119 Cal. 387, [51 Pac. 557], the following language is found: "In *Attorney-General v. Council of Birmingham,* 4 Kay & J. 528, the court indicated that in such cases only the right of plaintiff to relief, rather than the question of inconvenience to defendants was to be considered, although the latter represented a large population. We regard the foregoing as an extreme statement and deem it more proper to adopt the language of Swayne, J., in *Parker v. Winnipiseogee Etc. Co.,* 2 Black (U. S.) 545 [17 L. Ed. 333]: 'After the right has been established at law a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case.' In *Curtis v. Winslow,* 38 Vt. 690, it was said: 'In determining the right of a party to an injunction after a verdict in his favor by a court of law, the court will consider the relative loss to either party, the character of the locality in which the nuisance exists, and whether the injury is properly compensable in damages.' If the injury is only occasional, and the damages small, accidental rather than a probable and necessary consequence, an injunction will be denied. (*Wood v. Sutcliff,* 8 Eng. L. & Eq. 217.) In short, each case must be governed by the circumstances that surround it and by relative equities. (Wood on Nuisances, sec. 550.)" Nevertheless, the department sustained the judgment granting an injunction by which defendant, a large city, was restrained from polluting the water of Santa Rosa Creek although plaintiff's damages were found by the jury to amount to merely one dollar. The case is really in exact accord with the views which we have expressed above, for

this language is used with reference to plaintiff: "Her right as a riparian owner was, not only to have the water of the stream flow over her land in its usual volume, but to have it flow in its natural purity, and such pollution of the stream by the defendant as substantially impaired its value for the ordinary purposes of life, and rendered it measurably unfit for domestic purposes, is an actionable nuisance, and the fact that the defendant is a municipal corporation does not enhance its rights or palliate its wrongs in this respect. (Wood on Nuisances, sec. 427; High on Injunctions, 3d ed., sec. 810.)" We are convinced that upon reason and upon great weight of authority we should deny petitioner's prayer, considering the subject upon the assumption that we have power under the constitution in aid of our appellate jurisdiction in a proper case to suspend the operation of a prohibitory injunction pending an appeal.

Let the temporary order staying the operation of the injunction be dismissed and the petition be denied.

LORIGAN, J., concurred.

MR. JUSTICE HENSHAW deems himself disqualified to participate herein, and therefore declines to act.

SLOSS, J., concurring: I concur in the order. It seems to me, however, that the discussion concerning the right of a court of equity to refuse an injunction where the injury resulting to the plaintiff from a denial of the relief would be far less than that sustained by the defendant if the injunction were granted, is applicable to a consideration of appeals on their merits, rather than to the question here involved. If the court may balance the extent of the losses to be suffered by the respective parties, it exercises its discretion in this behalf when it grants or refuses the injunction. In this case the lower court has determined that it was essential, or at least proper, for the protection of the plaintiff's rights that the defendant should be restrained. We are not now reviewing the correctness of that determination. The petitioner cannot, of course, ask us in this proceeding to stay the force of the injunction on the ground that the trial court abused its discretion or that it erred otherwise in granting the injunction. What is claimed is that a suspension of the judgment "is necessary or proper to the complete exercise" of our appellate jurisdiction (Const., art. VI, sec. 4); it is claimed that a refusal to stay the injunction will so affect the subject of the controversy that, if the judgment should ultimately be reversed, the appellant will in large measure be deprived of the fruits of its successful appeal.

But we must consider the rights of the respondents, as well as those of the appellants. If the judgment of the court below

is right, the plaintiffs are absolutely entitled to have the wrongful acts stopped, not only after the determination of the appeal, but pending the appeal. Under the findings the acts complained of are inflicting a continuing injury upon the plaintiffs and their lands, an injury of a kind which has always been regarded by courts of chancery as irremediable and not capable of adequate redress by damages. If the appellant may ask that it shall not lose the fruits of an appeal which may turn out to be meritorious, the respondents are in at least as good a position to demand that the appellate court shall not irrevocably take away from them the benefit which they have already won and which will be confirmed to them if the judgment should be sustained. The exercise of the appellate jurisdiction must contemplate the possibility of affirmances as well as reversals. I do not think a stay of execution can be said to be necessary or proper to the complete exercise of appellate jurisdiction when such stay can be granted only at the risk of destroying rights which will unquestionably belong to the respondent if the judgment of the lower court shall be affirmed. This will always be the situation in the case of an appeal from a judgment enjoining acts which are found to be destructive of the plaintiff's real property. I think therefore, that in such cases, at any rate, this court should not undertake to suspend the force of a prohibitory injunction pending appeal. (*Swift v. Shepard,* 64 Cal. 423, [1 Pac. 493].) The statutory law gives no stay, and there should be none, unless the trial court, which is in the best position to weigh the respective equities, concludes to exercise its power (*Pasadena v. Superior Court,* 157 Cal. 781, [109 Pac. 620]), to suspend the injunction until the merits are finally determined.

It may be suggested, further, that the effect of an order by this court suspending the operation of a prohibitory injunction is to reverse, *pro tanto,* the judgment granting the injunction, and that in advance of a hearing on the merits. That this is so will appear more clearly if we suppose the case of an appeal from an order of the superior court granting an injunction *pendente lite.* In such case, an application for a suspension of the injunction pending the appeal could be urged upon precisely the same grounds as those here presented by petitioner. The thing decided by the trial court, in the case supposed, was that defendant should be restrained until a trial on the merits, or until that court should order otherwise. That conclusion is reviewable on appeal, but to suspend the order before a hearing of the appeal would clearly be to set aside the very thing decided below, viz., that the defendant should be enjoined until a trial or a further order. The situation does not differ where the injunction is

embraced in a final judgment. There too, it is a part of the adjudication that the defendant should be enjoined at once, and this adjudication should not be set aside on appeal before a hearing on the merits of the appeal.

ANGELLOTTI, J., and SHAW, J., concurred.*

DANIELS v. KEOKUK WATER WORKS.

SUPREME COURT OF IOWA. 1883.

[61 *Iowa Reports* 549.]

The petition states that plaintiffs are residents of the City of Keokuk, and are owners of dwelling houses therein, which are situated on a bluff. That defendant has erected an engine and pumping house at the foot of the bluff near said dwelling houses, and has placed therein boilers and engines, in operating which soft coal is burned, which emits dense masses of black smoke, gases and soot. That the top of defendant's smoke-stack is about opposite the base of plaintiffs' houses, and whenever the wind blows in certain directions the entire volume of smoke, gas and soot is turned in the direction of said premises, enveloping and penetrating said houses, and soot in large quantities is deposited on said premises, to the great damage, detriment, inconvenience and annoyance of the plaintiffs, whereby they have been deprived of the comfortable enjoyment of their property. The relief asked is that defendants be perpetually enjoined from so using their works as to cause smoke, gas and soot to fall on and envelope the premises as above stated.

The defendant admitted the erection of the works, but denied that the same were a nuisance, and stated that it was duly authorized to construct its works by an ordinance of the city, which was enacted in pursuance of a statute conferring the requisite power, and that said works have been worked without complaint for three years. The defendant has used all the latest appliances for consuming smoke, and has endeavored to so use

*"Appellant seeks the benefit of the doctrine of comparative injuries, sometimes known as 'the balance of hardship,' asserting that since the discomfort and injury caused to the inhabitants of Solano County by the fumes from the smelter are much less than the hardship suffered by the corporation in the partial suppression of its business, injunctive process should be denied. A similar question was discussed in one of the opinions in *Hulbert v. California Portland Cement Co.*, 161 Cal. 239, [118 Pac. 931], but that opinion was not signed by a majority of the court as the matter was not regarded by some of the justices as being essential to the determination of the proceeding then before the court. As this is an 'appeal on the merits,' and as the question is now squarely presented, we adopt the views expressed in the above mentioned opinion." MELVIN, J., in *People v. Selby Smelting and Lead Company* (1912) 163 California 84, 94.

the works as to prove of benefit to the public. That defendant has invested in said works a sum in excess of one hundred thousand dollars, and that the only reliable means of extinguishing fires in the city is the use of the water furnished by defendant.

The court entered a decree perpetually restraining the defendant from "using its smoke-stack without using a proper smoke consumer to prevent smoke, soot, etc., from escaping therefrom," and adjudged that each pay one-half of the costs. The plaintiffs appeal.

Anderson Bros. & Davis, for appellants.

Hagerman, McCrary & Hagerman, for appellee.

SEEVERS, J. The defendant has not appealed, and does not complain of the decree. Therefore we are relieved of the necessity of determining whether the court should have required the defendant to use a smoke consumer. The plaintiffs insist that they are entitled to an absolute and unconditional decree enjoining the defendant from using its smoke-stack, and thereby causing the nuisance of which complaint is made.

It will be observed that it is not alleged in the petition that the health of the plaintiffs or their families is affected by the alleged nuisance, or that their property has been, or probably will be, destroyed, but only that they have suffered great "damage, detriment, inconvenience and annoyance."

When the wind is in a southerly direction, smoke and soot from the smoke-stack are blown and deposited on plaintiffs' premises. At times the smoke is dense, and soot and smoke penetrate plaintiffs' houses to such an extent as to require the windows on the southerly side to be closed. Soot falls on clothes hung out to dry, and on the grass, flowers, carpets, beds, and on the persons of plaintiffs and their families.

The defendant's works are situate at the base of a bluff, on top of which are the premises of plaintiffs. The top of the smoke-stack is about twenty feet below the basement of the houses and from four to five hundred feet distant. We are impressed by the evidence that the plaintiffs, because of the escape of smoke and soot from defendant's smoke-stack, are deprived of the comfortable enjoyment of their property, and the statute defines this to constitute a nuisance, for which the party injured may bring an action at law, in which action the nuisance may be enjoined or abated and damages recovered. Code, sec. 3331.

It is insisted by the appellee that under this statute the appellants have a full, complete and adequate remedy at law, and that equity has no jurisdiction to enjoin a nuisance which only has the effect to deprive a person of the comfortable enjoyment of property. It is said that it has been so held in Wisconsin under

a similar statute. *Remington et al. v. Foster*, 42 Wis. 608. We do not feel called on to determine this question.

The defendant was authorized by an ordinance of the city to construct the water works. The ordinance was passed in pursuance of Code, section 472, which expressly confers on the city the requisite power. The ordinance requires a number of hydrants to be constructed, and the defendant is compelled to constantly supply a large quantity of water for extinguishing fires, and at the expiration of ten years the city has the option of purchasing the works at an appraised valuation. The defendant has expended about one hundred thousand dollars in the construction of the works.

But the only complaint made is in regard to the smoke-stack, and its possible faulty construction. What it cost does not appear, but undoubtedly it was only a small sum, compared with the whole cost of the works.

The appellants claim that the smoke-stack can be built one hundred feet higher at a comparatively small expense, and that, when this is done, the smoke and soot will pass over and beyond their premises. But this is mere conjecture. The smoke-stack cannot be built higher than it is with safety, unless it is enlarged at the base, and the work of construction proceed therefrom.

We are not satisfied that, if the smoke-stack should be constructed one hundred feet higher, no soot would be deposited on plaintiffs' premises, but conceding such would be the case, we are not satisfied there are not others that would suffer therefrom in as great a degree as the plaintiffs do. While the plaintiffs, possibly, might be relieved of smoke and soot, if the height of the smoke-stack were increased, it by no means follows that the defendant would be relieved of the charge of creating a nuisance.

The cases, both in this country and England, are numerous, where courts of equity have restrained nuisances by injunction, and have refused to do so. No practical benefit would result from a citation of cases. It is deemed sufficient to say that this remedy is more freely administered now than formerly. The rule is well known and understood. The real difficulty consists in the application of the rule to a given state of facts. Each case must be determined by its own special circumstances. Some courts more than others have hesitated or refused to grant an injunction until the existence of the nuisance has been established at law. If the matter or thing complained of is in and of itself a nuisance, equity will more readily interfere; or, if the injury is irreparable and cannot be compensated in damages, as when the nuisance is injurious to health, or has the effect to destroy property, the remedy by injunction is more fully admin-

istered. See *Pennsylvania Lead Company's Appeal,* 96 Pa. St., 116, where poisonous matter was deposited on the plaintiff's premises, whereby vegetation was destroyed. So in *Campbell v. Seaman,* 63 N. Y. 568, where in the manufacture of brick, a large quantity of "sulphurous acid gas" was produced, which destroyed the plaintiff's trees and vines. This, however, as we understand, was an action at law, and the existence of the nuisance had been established therein before the injunction was issued.

In *Richards's Appeal,* 57 Pa. St., 105, a case in some respects much like the one at bar, an injunction was refused, on the ground that the manufacture of iron was lawful, and its production essential. The court said: "Especially should the injunction be refused, if it be very certain that a greater injury would ensue by enjoining, than would by a refusal to enjoin. . . . Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving the party to his redress at the hands of the court, and jury." It is said, this case has been overruled by the Pennsylvania Lead Co., case cited above; but we do not understand this to be so. See also *Rhodes v. Dunbar,* 57 Pa. St., 274; *Goodall v. Crofton,* 33 Ohio St., 271; *Gilbert v. Showerman,* 23 Mich., 448; *Louisville Coffin Co. v. Warren,* 78 Ky. (Rodman), 400; *Green v. Lake,* 54 Miss., 540; *Simpson v. Justice,* 8 Iredell Eq., 115; *Hyatt v. Myers,* 73 N. C., 232.

In the foregoing cases, the nuisance was created by manufacturing companies, organized wholly for pecuniary profit, and the public benefit was purely incidental, and such as arises from the establishment of all enterprises of that character. While there is no doubt the defendant was organized with a view of proving a pecuniary benefit to the stockholders, yet this was not the only purpose of its organization. The benefit to the public, that is, to the citizens of Keokuk, is immediate and direct.

If the defendant were enjoined even for a time, the result might be disastrous; for the water supplied by it is the only efficient means of extinguishing conflagrations at the command of the city or its citizens. Besides this, a daily and hourly supply of water used for many purposes would be cut off.

We think it may be safely assumed that the rule in equity is, that where the damages sustained can be admeasured and compensated, equity will not interfere where the public benefit greatly outweighs private and individual inconvenience. *Coe v. Winnepissiogee Manufact. Co.,* 37 N. H., 254; *Porter v. Witham,* 17 Me., 292.

The right of every person to pure air must be conceded, but where persons choose to reside in cities and towns, which have

or should have efficient means of extinguishing conflagrations, and an abundant supply of water for many other purposes, they must be regarded as willing to surrender a portion of their rights for the attainment of so desirable an end. The works of the defendant are properly located. In no respect is the construction faulty. The injury caused to the plaintiffs is not irreparable. Their inconvenience and annoyance must yield to the public good in so far as the interposition of equity is concerned. There is no ground for equitable interference because of the multiplicity of suits if plaintiffs are driven to an action at law, because the remedy in this respect is full and complete.

Complaint is made of that portion of the decree taxing one-half of the costs to the plaintiffs. The decree in this respect, and all others, is fully as favorable to the plaintiffs as they are entitled to.

Affirmed.

MILLER v. EDISON ELECTRIC ILLUMINATING CO.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION. 1901.

[73 *New York Supplement* 376.]

O'BRIEN, J. This case, in many of its features, both of law and fact, is similar to *Bly v. Illuminating Co.*, 54 App. Div. 427, 66 N. Y. Suppl. 737, wherein the plaintiff, Bly, as a lease-holder of the premises 33 West Twenty-sixth street, brought suit for damages and an injunction because of the manner in which this defendant's power house, which is located at 47 West Twenty-Sixth street, was operated. In the present case the plaintiffs are the owners of the premises Nos. 37, 39, and 41 West Twenty-sixth street; and their property, therefore, is nearer the defendant's electric light plant. The evidence here of the vibration and jar produced by the machinery, the emission of soot, cinders, steam, and smoke, which, after leaving the chimney, came down upon this and adjoining houses, and the manner of conducting the defendant's business, particularly with respect to backing up carts and keeping them almost continuously on the sidewalk for the purpose of removing ashes, would support a finding that the power house, as so operated, was a nuisance, and caused injury to the plaintiffs' property. Upon this record, however, there are considerations which are fatal both to the injunction granted, and to the amount of damages awarded.

First, with respect to the injunction, which restrains the defendant from "overloading the machinery." There would be difficulty in determining just when this provision was violated,—the intervention of experts being necessary to ascertain precisely

what "overloading the machinery" means, what were its effects, and when it occurred; and therefore the enforcement of the injunction would, to a great extent, be impracticable. Moreover, the testimony to support the finding that this power house, as conducted, is a nuisance, was principally directed to showing conditions which were in existence when the action was commenced, but which at the date of the trial were, to some extent, either modified or removed. It appears that after attention had been called to the defects in the machinery, and the injurious manner in which the power house was being operated, changes were made, with the result that the vibration and jar to adjoining buildings were lessened, and to such a degree that at times they were imperceptible. So, also, an improvement was introduced in the method of removing the ashes, as well as in the general operation and management of the plant. Much of the testimony was that given by witnesses in another suit (Haynes against Edison Illuminating Co.), which, by stipulation, was read from the record in that case, and it related to conditions which at the trial of this action had, as stated, to some extent been modified or removed. It appearing, however, that there was sufficient evidence to support the conclusion that when this action was commenced the plaintiffs were entitled to equitable relief by way of injunction, it would have been proper for the court, even though the injurious and damaging features had been eliminated before the trial, and therefore an injunction would no longer be necessary, to have retained the action for the purpose of awarding the damages which the plaintiffs had shown that they had suffered. Although we differ, therefore, from the learned trial judge, in thinking that the provision in relation to the injunction is not supported, and that in form it is impracticable of enforcement, we might modify the judgment by striking out this provision as to injunctive relief, and affirming the award of damage. Upon this record, however, we are prevented from doing this by a statement in the decision itself, from which it appears that damages were included for a period for which no award could be made. Damages in an equity suit may extend down to the date of the trial, but they cannot be allowed, as was here done, down to the date of the decision. Of the total amount of damages awarded, we cannot tell how much was intended to cover the period of about seven months, between June, 1900, when the action was tried, and February, 1901, when the decision was made, and therefore we are unable either to affirm or modify the award of damages.

The judgment accordingly should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

CHAPTER III.
Who May Recover and Who Are Liable for Nuisances.

FORT WORTH & RIO GRANDE RAILWAY COMPANY v. GLENN.

SUPREME COURT OF TEXAS. 1904.

[97 *Texas Reports* 586.]

* GAINES, CHIEF JUSTICE. This is a certified question from the Court of Civil Appeals of the Second District. The statement and questions are as follows:

"This suit was brought by John Glenn, an infant two or three years old, by his father as next friend, Felix P. Glenn, to recover from appellant $1000 as damages for personal injuries sustained under the circumstances stated below, and resulted in a verdict and judgment in his favor for $450, from which this appeal is prosecuted by the railway company.

"Various errors have been assigned to the proceedings in the court below, but we have been unable to sustain any of the assignments. It is earnestly insisted, however, that there is a fundamental error requiring the judgment to be reversed, and as the contention is sustained by a decision of the Court of Appeals of New York, and as there are other cases pending involving the same question, in which, as in this case, our jurisdiction is final, we have been urged to certify the question to your honors and have finally concluded that it is our duty to do so.

"The petition alleged, and the evidence tended to prove, that appellant allowed an old well on its right of way near the residence of said Felix P. Glenn, the father of the appellee, to become so filthy as to create a nuisance and to make appellee sick, causing him discomfort and pain. The contents of the well, besides water, consisting, as alleged, and as the evidence tended in some measure to prove, in burnt cotton, cotton bagging, and ties, dogs, rabbits, cats, chickens and snakes. In other words, as we interpret the record, the case made was one of nuisance as defined in article 423 of our Penal Code.

"The question which we deem advisable to certify, then, is whether appellee, who was on the premises injuriously affected by the nuisance merely as a member of his father's family, with-

* Only the opinion of the court is given.—*Ed.*

out having any property right there, could maintain an action for damages on account of the sickness and discomfort resulting to him from the nuisance. In other words, whether such an action is maintainable by any person other than the owner or occupant of the premises injuriously affected; the Supreme Court of New York, in the case of *Kavanaugh v. Barber,* 12 N. Y. Suppl., 603, having decided the question one way, and the Court of Appeals in the same case, 30 N. E. Rep., 235, having decided it the other, holding, as we understand the decision, that where the claimant has no property right to be protected from infringement, he can not maintain an action for damages caused either by a public or private nuisance, which decision, in a more recent case coming before that court, was cited with approval. In this connection see also Sedgwick on Dam., sec. 946; Bishop on Noncon. Law, secs. 411, 424; *Lockett v. Ft. Worth & R. G. Ry. Co.,* 78 Texas, 211. We are not aware that the precise question was ever passed upon by the Supreme Court of this State."

We are of the opinion that the question should be answered in the affirmative. We do not regard the decision in the case of *Lockett v. Railway Co.,* 78 Texas, 211, as having any bearing upon the question. In that case the plaintiff brought an action against the railroad company, in his own behalf and that of his minor children, for causing water to stand and become stagnant near his residence so as to become "hurtful to the health of himself and children and highly offensive both to sight and smell." An exception on account of the misjoinder of his children was sustained and it was agreed that the action should proceed in his own behalf without amending the petition. He was tenant of the premises upon which he resided, and it was held, that, if the facts alleged by him were true, the company was liable to him, "for any injury resulting to himself . . . and the loss of the services of his minor children brought about by sickness caused by the nuisance . . . and for expenses necessarily incurred on account of the sickness so caused." The right of the children to recover was therefore not involved in that decision.

The case of *Kavanaugh v. Barber,* 12 N. Y. Suppl. 603, same case, 131 N. Y., 211, is more nearly in point. In that case the plaintiff resided with his family in a house which was the property of his wife, and brought suit against the defendant for a nuisance alleged to have been created by the latter. He claimed damages for the discomfort caused to himself and family, for sickness of his wife and children also alleged to have been caused by the nuisance, and for expenses incurred by reason thereof. In their decision the Court of Appeals of New York state the

question to be decided by them in the following language: "The question presented is whether, under the circumstances, a private action can be maintained by the husband for the discomforts caused by the offensive vapors." It would seem from this, that, notwithstanding the broad allegations in the statement of the plaintiff's cause of action, the evidence upon the trial narrowed the case to one of the mere discomfort of the plaintiff resulting from the nuisance. The opinion throughout indicates that the court did not have in mind a case where one, not the owner of the premises affected by a nuisance, had been made sick by noxious gases and the like. Therefore the question there decided and that certified to us are quite distinguishable.

In the subsequent case of *Hughes v. City of Auburn,* 161 N. Y., 96, *Kavanaugh v. Barber* is cited with approval. In that case the plaintiff, as administratrix of the estate of her daughter, brought suit under the New York statute against the city for injuries resulting in the death of the intestate, who was her daughter. The mother was the owner of the premises where she and her daughter resided; and it was claimed that the death of the latter was caused by the negligence of the city in permitting the escape of sewage from its sewer pipes into the cellar of the house in which they made their home. It was held that the plaintiff could not recover, but, as we understand the opinion, the decision, in the main at least, rested upon the ground, that, since the maintenance of the sewer by the city was a governmental function, the city could not be held responsible for an injury to health resulting from negligence on its part with respect thereto. This decision was by a divided court.

But the question before us was distinctly decided, adversely to our views, in the case of *Ellis v. Railroad,* 63 Mo., 131. There a husband and his wife resided in a house which was the property of the husband. The husband having died, the wife brought suit against the railroad company, claiming that in the operation of its trains the company had killed a horse on its track and had permitted the carcass to remain upon its right of way, in front of and very near to the house occupied by the plaintiff, until by reason of its decomposition the surrounding atmosphere became so noxious and offensive as to cause her to become seriously sick. It was held that by reason of the fact that the wife was not the owner of the premises occupied by her and her husband, she had no right of action. The opinion in the case concedes that if she had a property right in the premises she might have recovered.

With due respect to the learned court that decided that case the result reached seems to us illogical. If a suit be brought for

an injury to real estate caused by a nuisance it is clear that the plaintiff must show that he has some right which has been injuriously affected. If the damage be to the right of those occupying the property at the time, he must prove title, or at least a right of occupancy. If it be of such permanent character as to cause damage to an estate in reversion or remainder, the reversioner or remainderman, if he sue, must prove his title as such. But why should the owner of a house be allowed to recover damages for being made sick by a nuisance created in the vicinity thereof, and another lawful occupant be denied a remedy for a like reason? Let us recur to the case of *Ellis v. Railway Company,* as an example. There the carcass of the horse was a nuisance temporary in its character, and it could hardly be held that it diminished the value of the property which belonged to the plaintiff's husband to any appreciable extent. If he had been made sick, in what respect would his damages have differed in character from those of his wife in the actual case?

In *Hunt v. Gas Light Co.,* 8 Allen, 169, two cases for injuries to the health of plaintiffs were tried together. The plaintiffs were visitors at a house, where they were made sick by gas permitted to escape by the defendant company; and a judgment in their favor was affirmed. So in the case of *Holly v. Gas Light Company,* 8 Gray, 123, the suit was in behalf of a child who was made sick by the escape of gas in the house of her father. The jury decided against her either upon the question of negligence on part of the defendant company, or on account of contributory negligence on part of her father (whose negligence the court held should be imputed to her), and the verdict was sustained. But her right to sue if the company had been negligent and there had been no contributory negligence was not questioned.

It seems to us that a conflict of opinion upon this question has arisen from confusing the damage which results to property from a nuisance, with that special damage, such as sickness, which may result to an individual from a nuisance either public or private.

THOMPSON v. GIBSON.

COURT OF EXCHEQUER. 1841.

[7 *Meeson and Welsby's Reports* 456.]

* PARKE, B. This was an action on the case for continuing a nuisance to the plaintiff's market by a building, which excluded the public from a part of the space on which the market was lawfully held. There was a plea of not guilty, on which the question arises.

* Only the opinion of the court is given.—*Ed.*

A new trial had been already granted in this case. On the second trial, the defendants' counsel took an objection that the action would not lie against them. It appeared that the building was erected under the superintendence and direction of the defendants, though not on their own land, but that of the corporation of Kendal, of which corporation they were members, and it had continued there, obstructing the market, until after the commencement of the action. The building was erected in October, 1838. Lord Lonsdale was the owner of the market, and demised it to the plaintiff after that time, namely, in February, 1839; and the market was afterwards obstructed by the building.

It was contended, under these circumstances, that the defendants were not responsible for the continuance of the nuisance; that they were distinct persons from the corporation; and that though they were guilty of erecting, they could not be considered as having continued the nuisance, because they were not in possession of or interested in the soil on which the building was erected.

My Brother *Coltman* overruled this objection, but reserved the point; and a rule *nisi* having been granted to enter a nonsuit, and cause shewn, we have now to decide whether the objection was well founded or not; and we are all of opinion it was not. That the defendants were responsible for some consequences of the original erection of the building to the then owner of the market, though the defendants were not acting for their own benefit, but for that of the corporation, is not disputed; nor could it be. If they are considered merely as servants of the corporation, they would be liable, just as the servant of an individual is if he is actually concerned in erecting a nuisance; *Wilson v. Peto;* and as they would clearly have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market, or what other limit can be assigned to their responsibility other than the continuance of the injury itself? Is he, who originally erects a wall by which ancient lights are obstructed, to pay damage for the loss of the light for the first day only? or does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time? and if the then owner of the market might have maintained an action against the defendants for the injury to his franchise, for the whole period during which the defendants' act continued to be injurious to him, his lessee must be in the same condition as to subsequent injuries; for it is clearly established that he has a right of action for every continuing nuisance: and to that effect is

the authority of Roll's Abr., Nuisance, K. 2: "If one is seised of land near a river, and another stops it with loads of earth, and the tenant of the land adjoining leases to another for years, and then the stoppage continues, by which the land of the lessee is surrounded, the lessee shall have an action on the case against him; for though the stoppage was in the time of his lessor, the continuance was a wrongful damage to the lessee, for his land was surrounded." That is the case of *Westburne v. Mordant,* [Cro. Eliz. 191]: and in like manner, *Penruddock's Case,* [5 Rep. 100b], shews that a feoffee may bring a *quod permittat* for a nuisance, erected in the time of the feoffer, against him who did the wrong; and an action on the case is a substitute for this old writ. And further, in the case of *Some v. Barwish,* [Cro. Jac. 231], it was held that the devisee might sue for a nuisance erected in the time of the devisor, and continued afterwards; for the continuance is as the new erecting of such a nuisance. In the case of *Rosewell v. Prior,* [Salk. 459; 12 Mod. 639], which was an action against the defendant, who erected an obstruction to the ancient lights of the plaintiff, and then aliened, Lord Holt lays it down, that "it is a fundamental principle in law and reason, that he that does the first wrong shall answer for all consequential damages; and here," he says, "the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it be abated." And he adds, "that it shall not be in his power to discharge himself by granting it over." It is true that Lord Holt afterwards says, "that if the alienee of the land brought an action against the erector, and the erection had been before any estate in the alienee, the question would be greater, because the erector never did any wrong to the alienee." Lord Holt, however, does not intimate that the action would not lie; and the authority above cited, as well as the principle, that the assignee or lessee ought to enjoy the estate as fully as the assignor or lessor, and has a similar claim to compensation for the injury during his own time, shews that the action will lie. What is said in this and the other reports of this case as to the assignment of the nuisance affirming the continuance, appears to us to be given by way of additional reason. It was argued, however, that the assignee or lessee was not without remedy: he might abate the nuisance; but that affords no compensation in damages, and may, in some cases, be an expensive remedy; or he might maintain an action against the corporation who receive the rents of the building, or the tenants who occupy, as appears by the case of *Rippon v. Bowles,* [2 C. & M. 424], but that case shews that he is not bound to pursue that remedy, but may sue the original

wrongdoer. It was also said that the defendants could not now remove the nuisance themselves, without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong; and they cannot be permitted to excuse themselves from paying damages for the injury it causes, by shewing their inability to remove it, without exposing themselves to another action. We are therefore of opinion that the action is maintainable, and the rule must be discharged.

Rule discharged.

PLUMER v. HARPER.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1824.

[3 *New Hampshire Reports* 88.]

This was an action on the case for maintaining and continuing a dam across the Pemigewasset brook, from July 8, 1821, to August 6, 1822, whereby the plaintiff's land was covered with water, and injured.

The cause was tried at September term, 1823, upon the general issue; when it appeared in evidence, that the defendant, in 1818, erected a dam across the Pemigewasset brook, which caused the water to overflow the plaintiff's land, and injure his grass and trees. But it appeared, that the defendant, on the 23d November, 1820, by deed, conveyed to one John Harper the dam and the land, on which it stood; and the said John Harper has ever since been in possession. Since the said conveyance, however, the defendant has at times occupied the mills, connected with the dam, under said J. Harper; and he occupied them between the 8th July, 1821, and August 6, 1822.

A verdict was taken for the plaintiff, subject to the opinion of the court upon the above case.

* *Walker,* for the plaintiff.

Lyford, for the defendant.

RICHARDSON, C. J., delivered the opinion of the court.

It is contended, on the part of the defendant, in this case, that he is not liable for the injury, of which the plaintiff complains, because, previous to the time mentioned in the declaration, he conveyed the land, upon which the nuisance had been erected, to a third person; and so the continuance of the nuisance must be deemed, not his act, but the act of such third person; and the question is, whether the defendant is liable for the continuance of the nuisance, after having parted with his title to the land.

* The arguments of counsel are omitted.—*Ed.*

He, who is injured by a nuisance, may enter and abate it, or he may have redress by an action. 9 Coke 53, *Baten's case;* 5 *ditto* 101, *Penruddock's case;* 2 Salk. 459, *Rex v. Rosewell.*

In ancient times, the remedy by action, for a nuisance, was a *quod permittat,* or an assize of nuisance. In both those actions, the plaintiff had judgment, not only for his damages, but for the abatement of the nuisance. 9 Coke 53, *Baten's case.*

But, at the common law, an assize of nuisance was held to lie only against him, who erected the nuisance, and not against him, to whom the tenement had been transferred. The reason assigned for this was, that there was not found in the register any form of writ, in which it was not supposed, that the tenant erected the nuisance. This defect was remedied by the statute of Westminster 2, cap. 24, which made him liable, to whom the person, erecting the nuisance, had conveyed the tenement. This statute was construed to give an assize against him who erected, and him who continued, a nuisance jointly; and the form of the writ is given in *Baten's case,* 9 Coke 53. It is therefore clear, that in Lord Coke's time it was held, that he, who erected a nuisance, and then conveyed the tenement, remained liable after the conveyance, for any damage resulting from the continuance of the nuisance.

In the reign of Queen Elizabeth, the *quod permittat* and assize began to go out of use, and an action on the case to be brought for a nuisance; and in the 36th year of that reign, the case of *Beswick v. Combden* was decided in the King's bench. Moor 353—Croke Eliz. 402. The facts are stated differently by the two reporters. It was an action on the case, and Croke says, that the defendant erected the dam, which caused the water to overflow the land of J. S., who enfeoffed the plaintiff; and the question was, whether the feoffee could maintain case for the continuance of the nuisance? But Moor says, that the nuisance was erected by one, who enfeoffed the defendant, and that the question was, whether the feoffee was liable in case for the continuance of a nuisance? Whatever the facts may have been, both Croke and Moor agree, that the plaintiff had judgment. But two years afterwards, in the case of *Beswick v. Combden,* in the court of common pleas, which was an action on the case for the continuance of a nuisance, the action was held not to lie; because the proper action was an assize, or a *quod permittat,* and not case; and because the defendant could not be liable for permitting a nuisance to continue.

Penruddock's case, (5 Coke 101), was a *quod permittat* in the common pleas, brought by the grantee of him, to whose prejudice the nuisance was originally erected, against the grantee of

him, who first erected the nuisance; and the question was, whether the defendant was liable; and it was held, that he was, he having continued the nuisance after he had been requested to abate it.

Notwithstanding the decision of the common pleas, case seems after this time to have maintained its ground, and the other two remedies to have gone wholly out of use. The case of *Ryppon v. Bowles,* (Croke James 373), was an action on the case. The facts were, that one Thomas Henson erected a building, by which the plaintiff's window was darkened. Afterwards Bowles, the defendant, being in possession, the plaintiff brought an action against him, for continuing the nuisance. Coke, C. J., inclined to the opinion, that the defendant was not liable; but all the court held, that he, who erected the nuisance was liable.

In *Brent v. Haddon,* (Cro. James 555), the case was, that one Quarles had a mill, and erected a dam, which caused the water to overflow the plaintiff's land; Quarles leased the mill to Haddon, against whom the plaintiff brought his action, for continuing the nuisance; and Haddon was held to be liable.

In *Rosewell v. Prior,* (2 Salk. 460—1 L. Raym. 713), it was decided, that where a tenant for years erected a nuisance, for which an action was brought against him, and a recovery had, and he then underlet to another, an action might still be maintained against him who erected it, for the continuance of the nuisance.

Upon an examination of the cases bearing upon the question now to be decided, it will be found that, although in the lapse of time, the form of action has entirely changed, yet the books indicate no change in the liability of the wrongdoers. No case is to be found, in which it has been doubted that he, who erects a nuisance, continues liable as long as the nuisance continues. But it has often been made a question, how far, and under what circumstances, he, who adopted the acts of the original wrongdoer, shall be liable.

If the question, which this case presents, were now to be decided for the first time, it seems to us, that it would be very difficult to find a good reason, why the original wrongdoer should be discharged by conveying the land. The injury has no connection with the ownership of the land. If A. enter into the land of B. and there erect a dam, which causes the water to overflow B.'s land, there can be no doubt, that he will be liable for any damage resulting from such overflowing. So if A. enters B.'s land, and there erects a nuisance to the prejudice of C., it is clear, that A. will be liable to C. When he who erects the nuisance conveys the land, he does not transfer the liability

to his grantee. For it is agreed, in all the books, that the grantee is not liable, until, upon request, he refuses to remove the nuisance. It does not make the original act less injurious, because the grantee adopts it; and we are not aware, that in any action against an individual for a tort, it can be a good defence to show, that a third person has assented to the wrong, and thus become liable.

We are therefore of opinion, that the objection, which has been raised in this case cannot prevail, and that there must be

Judgment on the verdict.

WATSON v. COLUSA-PARROT MINING AND SMELTING COMPANY.

SUPREME COURT OF MONTANA. 1904.

[31 *Montana Reports* 513.]

* MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Appeal by defendant from a judgment and an order overruling its motion for a new trial.

Plaintiffs claim to be the owners of certain agricultural lands situated on Deer Lodge river below defendant's concentrating, smelting and reduction plant, and allege that defendant has polluted the water of Silver Bow creek, a tributary of Deer Lodge river, by the operation of its plant, to such an extent as to render such waters unfit for irrigation or domestic use; that the refuse and deleterious substances deposited in the stream by defendant have accumulated on their land and injured their crops, and have rendered the soil unproductive and sterile, permanently injuring the same. They pray judgment for $5,000 for deprivation of the use of the waters for domestic purposes for five years, for $5,000 for injury to and destruction of their crops during the same time, for $10,000 for permanent injury done their land by defendant, and for an injunction against the further pollution, and for costs and general relief.

Defendant, by answer, denies most of the allegations in the complaint; admits that defendant for a period of over five years has operated a concentrating, smelting and reduction plant at a point upon one of the tributaries of the stream above plaintiffs' land; admits that since the year 1897 defendant has so operated said plant, and that the waters flowing therefrom "have been impregnated with and have carried away tailings and other substances, and refuse matter produced in and resulting from such

* Portions of the opinion of the court are omitted.—*Ed.*

smelting operations, and that such tailings and other refuse matter have been carried by the said waters and deposited along the course of said stream and of Deer Lodge river, into which said Silver Bow creek flows, and upon the banks thereof wherever said waters have been accustomed to flow"; and alleges that it is lawful for it so to do. As an affirmative defense, defendant sets forth the prescriptive right to commit the acts above stated. It then pleads Section 29, Code of Civil Procedure of 1887, Sections 484 and 524, Code of Civil Procedure of Montana, Subdivision 1, Section 513, Code of Civil Procedure, as amended by House Bill 75, Session Laws 1901, page 157, as defense by way of the statutes of limitation. The plaintiffs, by replication, deny all the affirmative allegations of new matter contained in the answer.

1. Under the facts disclosed by the record it is apparent that the nuisance complained of as causing the injury for which damages are sought arose from individual acts of different mining and reduction companies operating mines and plants in the city of Butte, whereby they have discharged deleterious and poisonous matter into the waters of Silver Bow creek, a tributary of Deer Lodge river; that the nuisance was merely incidental to and the result of such acts; and that the injury was not caused by the joint acts of defendant and any other corporation or person.

Under the following authorities the defendant was liable to plaintiffs for whatever damage it caused by its own wrongful acts, and none other: *Chipman v. Palmer,* 77 N. Y. 51, 33 Am. Rep. 566; *Harley v. Merrill Brick Co.,* 83 Iowa, 73, 48 N. W. 1000; *Sellick v. Hall,* 47 Conn. 260; *Loughran v. City of Des Moines,* 72 Iowa, 382, 34 N. W. 172; *Martinowsky v. City of Hannibal,* 35 Mo. App. 70; *Little Schuylkill Nav. Co. v. Richards's Adm'r.,* 57 Pa. 142, 98 Am. Dec. 208; *Miller v. Highland Ditch Co.,* 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; *Brown v. McAllister,* 39 Cal. 573; *Westgate v. Carr,* 43 Ill. 450; *Partenheimer v. Van Order,* 20 Barb. 479; *Lull v. Fox & Wis. Imp. Co.,* 19 Wis. 100; *Brennan v. Corsicana Cotton-Oil Co.,* (Tex. Civ. App.) 44 S. W. 588; *Van Steenburgh v. Tobias,* 17 Wend. 562, 31 Am. Dec. 310; *Auchmuty v. Ham,* 1 Denio, 495; *Keyes v. L. Y. G. W. & W. Co.,* 53 Cal. 724; *Sloggy v. Dilworth,* 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

Defendant could not be be held to respond in damages for the entire injury occasioned to plaintiffs by the nuisance complained of, because confessedly it only contributed to this injury. The full damage, therefore, must be apportioned among all the wrong-doers. The mere fact that it is difficult to determine what

part of the damage was occasioned by acts of the defendant is no objection to the relief asked. (*Chipman v. Palmer,* 77 N. Y. 51, 33 Am. Rep. 566; *Harley v. Merrill Brick Co.,* 83 Iowa, 73, 48 N. W. 1000; *Sellick v. Hall,* 47 Conn. 260; *Lull v. Improvement Co.,* 19 Wis. 101.) The Supreme Court of Connecticut, in *Sellick v. Hall, supra,* uses the following very pertinent language: "It may be very difficult for a jury to determine just how much damage the defendant is liable for and how much should be left for the city to answer for; but this is no more difficult of ascertainment than many questions which juries are called upon to decide. They must use their judgment, and make their result, if not an absolutely accurate one, an approximation to accuracy. And this is the best that human tribunals can do in many cases. If the plaintiff is entitled to damages and the defendant liable for them, the one is not to be denied all damages, nor the other loaded with damages to which he is not legally liable, simply because the exact ascertainment of the proper amount is a matter of practical difficulty."

Like all other cases for the recovery of damages in actions upon torts, a jury must be trusted to arrive at a fair estimate of the damages after a full consideration of all the evidence which may be introduced upon the subject. However, competent evidence must be produced of all facts necessary to a recovery, upon which the jury can base a reasonably reliable conclusion; nothing can be left to mere conjecture. . . .

3. It is further disclosed by the record that plaintiffs procured a conveyance of this property from the Northern Pacific Railroad Company, acknowledged on the 26th of January, 1900. Plaintiffs, therefore, could not recover for any injury arising from a destruction of the crop, by reason of the nuisance complained of, prior to that date, unless they introduced evidence showing that they were in possession of the property or entitled to such possession, and were entitled to recover for injuries to such possession.

4. Again, the record discloses that the defendant became the purchaser of the smelting and reduction plant, through the operation of which the nuisance complained of occurred, in 1897. It is clear that the defendant could not be held liable in this or any other action for damages caused by the operation of such plant by its predecessors in interest. If such damage arose, plaintiffs or their predecessors in interest were entitled to recover against the predecessors in interest of this defendant for such damage prior to the date when defendant became the purchaser and went into possession and operation of the property. Therefore, under any theory, plaintiffs could not recover damages against this de-

fendant which were the result of acts committed prior to the day it became owner of the plant. . . .

8. Another important question upon which error is assigned must be considered. The evidence discloses that defendant became the purchaser of the reduction plant, the use of which is alleged to have contributed to the nuisance in question, in 1897. Counsel for appellant contend that defendant cannot be held liable to pay damages for a continuance of this nuisance, without allegation and proof of notice to defendant of the existence of the nuisance, and of the damage accruing therefrom. There is no doubt but this is a correct statement of the common-law rule as it has existed since the *Penruddock Case,* decided in Lord Coke's time. It has been adopted and followed with great uniformity by the courts of this country, and, were it not for Section 4554 of our Civil Code, we should not hesitate to indorse and follow it. This section reads as follows: "Every successive owner of property, who neglects to abate a continuing nuisance upon, or, in the use of, such property, created by a former owner, is liable therefor, in the same manner as the one who first created it." Counsel for appellant cite this section, and then say, "This provision of the Code has been interpreted in *Grigsby v. Clear Lake Water Co.,* 40 Cal. 396," and then quote from the opinion in that case language which sustains the principle for which they contend.

An investigation of the statutes of California discloses that the section of the statute of that state (3483, Civil Code), identical with Section 4554, above quoted, was first adopted, in 1872. The case above referred to was decided in 1870. It cannot be considered as construing a statute not then in existence. True, the annotators of both the California Codes and those of our own state cite this case under the sections above referred to, which would naturally lead one to believe that it is cited as a construction of such sections. If such citation was so intended, it was done either through inadvertence or mistake, as is clearly shown above.

The enactment of Section 3483 of the California Code may have been induced by the rendition of the decision above referred to; at all events, in our judgment it is directly contrary to the principle announced in the decision, and makes the successor to title to property who does not abate a continuing nuisance in the use of such property, which has been created by a former owner of the property, liable therefor in the same manner as the owner who first created it. Here it may be gathered from the pleadings and evidence that the nuisance complained of was created by defendant's predecessors in interest by the use of the property.

There is no showing that defendant abated or sought to abate it, but, on the contrary, it appears conclusively that it continued the nuisance. Therefore the question of the necessity of notice to it, as claimed by the counsel, must be determined by the law as applicable to its predecessors in interest, and, if the law does not require notice to them, none was necessary to this defendant, under the plain provisions of Section 4554, *supra*. We find no cases holding that the creator of a nuisance need be given notice of its existence before suit is brought against him, and we believe none exists. Every man is charged with the knowledge of the results of his own acts, and every one must so use his own property as not to injure his neighbor's. . . .

We advise that the judgment and order appealed from be reversed.

*Per Curiam: For the reasons stated in the foregoing opinion, the judgment and order are reversed, and the cause is remanded.**

* "The real question upon which the defendant apparently relies and which it seriously urges here is that the place where the horse was killed is a nuisance; that it was constructed by the defendant's grantors; that the subsequent maintenance of this nuisance by the defendant, with full knowledge of its dangerous character, does not alone make it liable for damages occasioned thereby. It is insisted that before the defendant can be made liable express notice of the existence of the nuisance and a request to abate it must be given. The petition does not aver such a notice and request, and it was demurred to for that reason, but the demurrer was overruled. The evidence did not establish such a notice and request, and a demurrer to that was overruled.

"The court instructed the jury in substance that the maintenance of the nuisance, with knowledge of its dangerous character before the injury, was sufficient to make the defendant liable. This instruction is said to be erroneous. The defendant cites a long line of eminent authorities in support of its contention, commencing with *Penruddock's Case* (Eng. Com. Pl. (1598), Coke's Rep., vol. 3, p. 205; part 5, p. 100*b*), of which the supreme court of Michigan said: 'It has antiquity on its side and is therefore entitled to all the consideration and weight that time can give to an adjudication as a precedent for other courts to follow.' (*Caldwell v. Gale*, 11 Mich. 77, 83.) The defendant further cites: *Philadelphia & R. R. Co. v. Smith*, 64 Fed. 679; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 57 Fed. 441; *Groff v. Ankenbrandt*, 124 Ill. 51; *Ahern v. Steele et al.*, 115 N. Y. 203. . . .

"The reason given for the rule that notice and request to abate must be given to one who becomes the owner of a nuisance which was constructed by another is that such a person may be ignorant of the character of the thing denominated a nuisance, and that a notice and request to abate would place him upon the same ground as the original wrongdoer. If he is not ignorant, the reason for giving notice fails and the rule disappears.

"In this case the evidence shows that the defendant's knowledge of the nuisance in question was equal to or better than that of the plaintiff. The fence, the excavation, the embankment and the narrow passage-way between the embankment and the fence were all on the right of way, only

EDGAR v. WALKER.

SUPREME COURT OF GEORGIA. 1898.

[106 *Georgia Reports* 454.]

* LEWIS, J. Mrs. N. C. Edgar brought suit against B. F. Walker for $5,000, making by her petition substantially the following case: Petitioner was the owner of a life-estate in a certain lot of land lying north of the city of Atlanta, and has occupied the same for a home for herself and family since the year 1875. Defendant is the owner of adjoining lands on the north, east, and south of petitioner's lot. At the time petitioner built upon her lot in 1875, the same was higher than the adjoining land of Walker, and the natural flow of surface-water caused by the rain was from petitioner's lot on and over the lands of Walker into a deep ravine which ran through the lands of Walker. In 1892 Walker graded his lands so as to elevate the same from two to five feet higher than her lot, with such an

* Only a portion of the opinion is given.—*Ed.*

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a few feet from the railroad track. The section foreman whose duty it was to keep the track, fence and right of way in proper repair passed and repassed this spot frequently, and personally examined the passageway and promised to have it fixed so that stock could not enter it. If the rule contended for by the defendant were a new question in this state we would without hesitation decline to apply it to the facts here presented, and certainly we feel no disposition to modify or limit the position already taken by this court. Notice of, and a request to abate, the nuisance was unnecessary in this case; actual knowledge of its existence was sufficient." GRAVES, J., in *Martin v. Chicago, Rock Island and Pacific R. R. Co.* (1909), 81 Kansas 344, 346-350.

"The fourth error assigned is, that the court instructed the jury that no notice was necessary to be given to the defendants to take down or repair said dam before the bringing of the suit, and that the plaintiff was entitled to recover damages which had accrued before the giving of such notice. The error is sought to be established upon the broad principle, that an action cannot be maintained against a defendant, for the continuance of a dam or other nuisance on his land, erected by another, unless he refuse to remove it after request. The doctrine, thus broadly stated, is derived from *Penruddock's* case, 5 *Coke* 100, (40 Eliz.), and receives apparent countenance from other more modern authorities. *Winsmore v. Greenbank,* Willes 583; *Brent v. Haddon,* Cro. Jac. 555 (17 Jac. 1); 1 Chitty's Pl. (7th ed.) 101, 423; 2 *Ibid.* 770, note h; 2 Saund. Pl. & Ev. (2d ed.) 686. None of these cases, properly considered, support the doctrine contended for. The very reverse of the proposition is law. An action may be maintained against a party who continues a nuisance erected by another without a request to abate it. If the request to abate the nuisance be necessary to maintain the action, in all declarations for the continuance of a nuisance, an averment of a request to abate it would be necessary. But the precedents are otherwise, and there is no authority requiring it. . . . Whether there be in fact a continuance of the nuisance by the defendant, is a question of evidence. If the defendant,

incline towards her lot as to cause rain-water to flow upon her land, thus injuring and damaging her property, which was wrongfully and maliciously done with intent to injure petitioner. Petitioner further complained that said Walker allowed to accumulate on his premises offensive matter from privies and other sources, which, exposed to the sun, filled the air with a foul odor, making petitioner's premises unhealthy and undesirable as a home; and that by each heavy rain said foul accumulations and poisonous matter were gathered up by the water and carried into petitioner's yard, and in and around the door of her dwelling; that Walker constructed a sewer for the purpose of carrying off the drainage, but that it was too small to carry off the rain-water; water would frequently rise to such an extent as to enter her house; and these acts not only damaged her land greatly, diminishing it in value, but likewise caused sickness of herself and children, impairing their health, diminishing her capacity to earn a living, and otherwise causing expense. The defendant answered in detail the allegations in plaintiff's peti-

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by any active participation of his, assent to the wrong, if, for instance, he repairs the dam, and holds back the water upon his neighbor for the use of his own mill or canal, he continues the nuisance, and no request to abate it is necessary. But if the defendant simply suffer a dam erected upon his land by a former owner to remain without being used by him, it is no continuance of the nuisance, unless he be first requested to remove it. . . .

"In *Hughes v. Mung*, 3 Har. & McHenry 441, the action was brought against the owner of land, for the diversion of a water-course from the land of the plaintiff to the land of the defendant, made by the father of the defendant when he was owner of the defendant's farm. On the trial, the plaintiff offered evidence to prove that the stream, as diverted, flows through land claimed by the defendant. That the defendant, since his title to the land was acquired, has used the stream of water in the channel in which it now runs, by watering his stock therein, by enclosing it within his fences, and occasionally throwing it out upon his meadow. The court were of opinion, and so directed the jury, that an action will lie for the diversion of the water-course against the person who diverted it, and against any person who keeps up the obstruction which changed the water-course; but no adventitious accidental advantages, derived from the use of the water running in its present course, will amount to a continuance of the nuisance, without some act done by the defendant to keep up the obstructions occasioning the diverting of the course of the stream; and that the action could not be supported without showing that those acts were done since the title of the plaintiffs accrued to their lands. This opinion was subsequently affirmed in the Court of Appeals.

"The whole doctrine, of the necessity of a request to abate a nuisance, is derived, as has been said, from *Penruddock's* case. That was a writ of *quod permittat prosternere,* brought to abate a nuisance occasioned by the erection of a house on the defendant's land, so near the land of the plaintiff, that the water fell from the roof of the defendant's house upon the curtilage of the house of the plaintiff. Clark, the plaintiff, purchased his premises after the erection of the nuisance. Penruddock, the

tion, denying his liability, and the wrongs and injuries therein complained of; alleging that he had done everything in his power to protect the property claimed by petitioner, and that if there was any failure of the drain-pipe to carry off the water, it was due to the negligence and wrongful conduct of petitioner, and those in her family, in purposely filling up the mouth of the drain-pipe, and in not using care or proper caution to keep the same from filling up; that the offensive odors and matter upon petitioner's lot were not caused by any act of defendant, but by petitioner, and those constituting her family and living upon said lot, her lot being in nowise provided with sewerage or other usual facilities indispensable to residence premises. Evidence as to the value of the premises varied from $250.00 to $1,000. There was quite a volume of testimony introduced, in which there was considerable conflict. The jury returned a verdict for plaintiff for the sum of $125; whereupon plaintiff moved for a new trial, and assigns error on the judgment of the court overruling her motion. The general rule of law governing the rights and liabilities of adjacent landowners growing out of injuries occasioned by changing or diverting the course of surface-water

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defendant, also purchased his premises after the house which occasioned the nuisance had been erected thereon; so that the action was brought by the feoffee of the premises injured, against the feoffee of the premises which occasioned the injury. The question was, whether the feoffee of the premises injured could maintain the action for the nuisance and wrong done in the life of his feoffor. The objection was, that if the owner of the land to which the injury was done convey the premises, the wrong is remediless, for the feoffee shall take the land in the same plight that it was conveyed to him. The court, however, resolved that the distilling of the water in the time of the feoffee was a new wrong; so that the permission of the wrong, by the feoffor or the feoffee of the premises where the nuisance was erected, to continue to the prejudice of another, shall be punished by the feoffee of the house to whom the injury was occasioned. And if the same shall not be reformed after request made, the *quod permittat* lieth against the feoffee, and he shall recover damages if he doth not reform it; but without request made, it doth not lie against the feoffee. It is remarkable that so accurate a writer as Judge Greenleaf treats the case, as authority for the necessity of a request to abate the nuisance, only where the action is brought by the grantee of the house to which the nuisance was committed in the time of his grantor. (2 Greenl. Ev., Sec. 472.) But treating the case as an authority for the necessity of a request to abate the nuisance, only in cases where the premises upon which the nuisance is erected have been conveyed, and giving it its full weight, it renders the request to abate necessary only where the defendant merely permitted the wrong to continue. It is obvious that the defendant did no act assenting to the wrong, or appropriating it to his use, and thereby adopting or continuing the nuisance. He was, therefore, no more liable for the injury than he would have been if a stranger had entered upon his premises and placed a nuisance there without his assent. The case is in strict accordance with the principle adopted in *Hughes v. Mung*, viz. that the defendant's living

upon such lands is so well settled by the decision of this court and the lucid opinion of Justice Fish in the case of *Farkas v. Towns,* 103 Ga. 150, that it is unnecessary for us to enter upon a further discussion of the subject. We will, therefore, confine ourselves to a brief consideration of such grounds in the motion for a new trial as may seem to have any merit whatever in them. . . .

2. It is further complained in the motion, the court erred in instructing the jury, that the defendant is not liable for any damage inflicted on plaintiff by reason of the dumping of offensive matter by the tenants upon the property of plaintiff, or in such a place on their premises leased by them that said offensive matter, if washed by rain, would be carried on plaintiff's land; but that if any such acts were done by defendant's tenants, and plaintiff was damaged thereby, the tenants, and not the defendant Walker, would be liable for that part of the damage. Under the facts in this case, there was no error in this charge. It was undisputed that some of the debris or material claimed by plaintiff to be offensive was on that portion

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in the house did not amount to a continuance of the nuisance by him. . . .

"The same distinction is very clearly stated in 2 Saund. Pl. & Ev. 686. 'Though, in torts, the assignee of an estate is not liable for an injury committed before he came to the estate, yet, if he continue a nuisance, he will be liable for such continuance. And every occupier is liable for the continuance of the nuisance on his land, though erected by another, if he refuse to remove it after notice.' In other words, the defendant is always liable if he *continue* a nuisance erected by another; and if he suffer it to remain on his land after a request to remove it, that is, in law, a continuance of the nuisance by him. The necessity of the request to abate the nuisance is not founded on the principle of bringing home to the defendant a knowledge that the act done operates as a nuisance. The doctrine of the *scienter* does not apply. A wrongful act is equally a tort whether the defendant knows or was ignorant of its injurious effects. Nor is it necessary to charge the defendant with a malicious intent, for that is not the essence of the wrong. The only principle upon which the request is essential, is to bring home to the defendant a voluntary continuance, and consequent adoption, of the act which constitutes the nuisance." GREEN, C. J., in *Morris Canal and Banking Co. v. Ryerson* (1859), 3 Dutcher (N. J.) 457, 468 ff.

In *Castle v. Smith* (Supreme Court of California, 1894), 36 Pacific Reporter 859, the court in construing the statute referred to in the principal case says, at page 861: "It is claimed that this section dispenses with notice of the nuisance to the successive owner. But it is to be observed that the owner who creates the nuisance is presumed to have notice that it is a nuisance; therefore, is held liable without notice; whereas, no such presumption is indulged against his successor. Consequently, notice to the successor must be proved, else he would be held liable in a different manner from the owner who created the nuisance, as well as for a different cause."

of the premises owned by the defendant which he had rented to tenants, and over which he, at the time, had no control. There was no pretense that this matter was on that part of the premises when the same were rented to the tenants; nor that there was any rerental of these premises to the tenants after the accumulation of the offensive material. "A party is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failure of duty. If such consequences were caused by the acts of others, so operating as to produce the injury, he would not be liable." *Brimberry v. Sav. Ry. Co.*, 78 Ga. 641. As a general rule a landlord is not liable to third persons for any injury they sustain occasioned by the wrongful acts of his tenant in keeping the rented premises in a dangerous or unhealthy condition. The only exceptions to this rule are, 1st, when the landlord has contracted with the tenant to repair; 2d, when he has let the premises in a ruinous condition; 3d, when he has expressly licensed the tenant to do acts amounting to a nuisance. 2 Woodfall's Landlord and Tenant, 735-6; 2 Wood's Landlord and Tenant, Sec. 536; 12 Am. & Eng. Enc. L. 719, and citations. . . .

Judgment affirmed. All the Justices concurring.

HARRIS v. JAMES.

QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE. 1876.

[45 *Law Journal Reports (New Series), Common Law,* 545.]

Action against the owner and tenant of a field by the occupier of adjoining lands for injury caused to his land by the smoke from certain limekilns and by stones and dirt thrown upon it in the process of blasting the limestone in the said field. The following paragraphs in the statement of claim show the ground of the claim:—

3. The field called Kirkcross is full of limestone, and has been let to the defendant Ferdinand James, by the defendant William Senhouse, for the purpose of being worked as a lime quarry.

4. The defendant Ferdinand James has accordingly, with the consent and authority of the said defendant William Senhouse, opened a limestone quarry in the said field, and erected limekilns thereon for the purpose of burning lime, and in which he has burnt the limestone taken from the said quarry.

5. The smoke and vapours arising from this kiln spread over the lands of the plaintiff, and have injured the herbage and lessened the value of the land. This injury is partly the natural and necessary result of limekilns being used in the said field called Kirkcross, and partly the result of the improper manner in which the kiln has been worked.

6. The said quarry is worked by means of blasting and in the process of blasting, quantities of dirt and stone are from time to time thrown onto the plaintiff's lands, and it has thereby been rendered unsafe for the plaintiff or his men to work on the said lands. This is partly the necessary result of working a quarry in the said field, and partly of the negligent and improper manner in which the quarry has been worked by the said defendant Ferdinand James.

Demurrer by the defendant Senhouse to "so much of the statement of claim as claims damages in respect of the matters mentioned in paragraphs 5 and 6, on the ground that the statement of claim does not show that the defendant William Senhouse is liable in respect thereof."

Crompton in support of the demurrer. Because the tenant has created a nuisance on the demised land, the landlord is not therefore liable. *Rich v. Basterfield,* [4 Com. B. Rep. 783], shows that although an owner of property may be liable, as occupier, for injuries arising from acts done on his property by persons who are there by his permission, yet such liability only attaches upon parties in actual possession.

(LUSH, J. The allegations here seem to amount to this, that the working *must* be a nuisance, not merely *may* be.)

The *Queen v. Pedley,* [1 Ad. & E. 822], shows that the principle of liability in the landlord is when he lets with a nuisance existing. Then in *Gandy v. Jubber,* [5 B. & S. 78], Crompton, J., says: "The owner ought not to be liable for subsequent nuisances which did not originate with himself and which he cannot prevent; for these, so long as the tenant is in possession, the owner is irresponsible." And Blackburn, J., says: "The nuisance must be a normal one." And in the judgment of the Exchequer Chamber, [9 B. & S. 14], it is said: "We agree that to bring liability home to the owner the nuisance must be one which in its very essence and nature was a nuisance at the time of letting." Here the nuisance has been created since the demise, and to hold the landlord responsible would be to make him a principal in every wrongful act of his tenant. He might be made liable on a building lease if the lessee obstructed ancient lights.

(LUSH, J. Not unless the conditions necessarily required the lessee to build so as to cause the obstruction. BLACKBURN, J.—*Rich v. Basterfield* [4 Com. B. Rep. 783], is the only case at all in your favour, and I think that is a desperate refinement.)

Bompas, contra, was not called on to argue.

BLACKBURN, J. The fifth paragraph in the statement of claim raises the whole question here. There can be no doubt that

where a person authorises and requires another to commit a nuisance he is liable for that nuisance; and if the authority be given in the shape of a lease he is not the less liable. I do not think when a person demises property he is to be taken to authorise all that the occupier may do. If land were let on an agricultural lease, and there were a requirement that the tenant should cultivate the soil as well as possible, and the tenant brought a large quantity of inodorous manure on the land and placed it so as to be a nuisance, I do not think that his landlord would be liable, for he could not be said in any sense to have authorised the creation of this nuisance; nor would he in the case put by Mr. Crompton, of letting ground on a building lease where the lessee created a nuisance by obstructing light and air by means of the buildings he erected; there the lessor would not be liable, because he had not authorised his tenant to build so as to obstruct the light and air of others.

In the present case, as I understand the averments, the field was let for the very purpose and object of being worked as a lime quarry and for erecting lime-kilns and burning lime. When, then, it is stated as a fact that the injury complained of arose from the natural and necessary consequence of carrying out this object, and as the result of lime getting and lime burning, then I think we must say that the landlord authorised the lime burning and the nuisance arising from it as being the necessary consequence of letting the field in the manner and with the objects described. In *Rich v. Basterfield,* [4 Com. B. Rep. 783], the Court of Common Pleas came to a conclusion of fact which authorised their conclusion upon the case. There, a former occupier of the premises, where the chimney was, used to burn coke in the fire, and caused no smoke which could be at all injurious to the plaintiff; and the judgment proceeded on that ground, as is evident from the following passage:—"It being therefore quite possible for the tenant to occupy the shop without making fires . . . and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such manner as not to create any quantity of smoke that could be deemed a nuisance, it seems impossible to say that the tenant was, in any sense, the servant or agent of the defendant, in doing the acts complained of. The utmost that can be imputed to the defendant is, that he enabled the tenant to make fires if he pleased." Assuming that the evidence really did establish the facts which the Common Pleas thought it did, and if it was not the necessary consequence of burning fires in the chimney that there should be smoke, I have no fault to find with the decision; but then, this case is not the

same, because the fifth paragraph finds that the injury arising from the smoke and vapours is the natural and necessary consequence of the use of the land, and the plaintiff must therefore have judgment upon the demurrer to that paragraph.

The sixth paragraph is nearly the same and if there be any doubt as to the meaning of the averment, we give leave to the plaintiff to amend it by putting in one or two words to make the meaning perfectly clear.

As to the injury caused by working the quarry in a negligent and improper manner, the landlord is not liable for that, but if the demise to the tenant was on the terms that he should work the quarry by means of blasting, then he is liable; and I construe the paragraph as averring this. However, it may be prudent for the plaintiff to amend it, that there may be no doubt, and then the reasoning as to the fifth paragraph applies equally to this and the demurrer to it cannot be allowed.

LUSH, J. As to the case of *Rich v. Basterfield,* [4 Com. B. Rep. 783], I have always looked upon the decision there as one of excessive refinement. The building there was built for a coffee-shop, and a chimney was erected over the fireplace in the shop. I should have thought that the building with the fireplace and chimney was let for the purpose of being used in the ordinary way and for burning ordinary fuel in it. The Court, however, found as a fact that it was not so let, and that being the ground of their decision the case has no application here.

This field was let by the defendant Senhouse for the purpose of its becoming a quarry, and the ordinary and necessary mode of working the quarry and getting the lime was to burn it in the kiln as has been done. That has reference to paragraph 5. I should myself read paragraph 6 as it stands also in favour of the plaintiff; but it may be prudent to amend it, to raise distinctly the issue, and he has leave to do so.

*Judgment for the plaintiff.**

* "I am of opinion that the ruling of my Brother Channell was right, and that there was no evidence which ought to have been left to the jury. The act complained of was not an act done by the defendants or by any one authorized by them, nor was it an act done for their benefit, or adopted by them. On the contrary, we must assume from the correspondence that it was against their will. It has, however, been contended that, the nuisance having been wrongfully created by a stranger, the defendants are responsible for its continuance. There might have been something for the jury, if it had been shown that the defendants had sanctioned or approved of the act of Welch, or had derived any benefit from it. But nothing of the kind appeared. The weir was erected at a time when the two print-works were in the occupation of the same tenant: and it was only upon the discontinuance of this unity of occupation that its existence afforded any ground of complaint. It is

LAMBTON v. MELLISH.
LAMBTON *v.* COX.

CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE. 1894.

[*Law Reports* (1894) 3 *Chancery Division* 163.]

The plaintiff was the lessee and occupier of a house adjoining Ashstead Common in Surrey. The premises of the defendant Mellish were about 60 or 70 yards from the plaintiff's premises, and those of the defendant Cox were about 120 or 130 yards from the plaintiff's premises and about 100 yards from those of the defendant Mellish, and were separated from both by a line of railway.

It appeared that during the summer months a large number of school treats and assemblages of that description took place on Ashstead Common.

The defendants Mellish and Cox were rival refreshment contractors who catered for visitors and excursionists to the common, and both the defendants had merry-go-rounds on their premises, and were in the habit of using organs as an accompaniment to the amusements.

It appeared from the evidence that these organs were for three months or more in the summer continuously being played together from 10 or 11 a.m. till 6 or 7 p.m., and that the noise caused by the two organs was "maddening."

The organs used by Mellish had been changed, and it was alleged by him that the organ in use when the motion was made was a small portable hand-organ making comparatively little noise. That used by Cox was a much larger one provided with trumpet stops and emitting sounds which could be heard at the distance of one mile.

The plaintiff now moved against the defendant in each action for an injunction restraining him from playing any organs so as to cause a nuisance or injury to the plaintiff or his family, or other occupiers of the plaintiff's property.

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suggested that the nuisance being upon land in possession of the defendants, they could have removed it, and are therefore responsible for its continuance. But the question is whether they were bound to risk the consequences of a personal conflict by doing that which the plaintiff (they assenting) might have done himself. I must confess I do not see why the plaintiff should cast upon the defendants, who have no interest whatever in the matter, a responsibility which he himself declines to incur. I cannot say there was any evidence which could have warranted a verdict for the plaintiff." BOVILL, C. J., in *Saxby v. Manchester and Sheffield Railway Co.* (1869), L. R. 4 C. P. 198, 203.

* *Farwell,* Q. C., and *Borthwick,* for the plaintiff in both actions.

Whitehorne, Q. C., and *Butcher,* for the defendant Mellish.

Moloney, for the defendant Cox.

CHITTY, J.:—

Notwithstanding the conflict of evidence, I am of opinion that the plaintiff is entitled to the injunction he asks for as against the defendant in each action.

A man may tolerate a nuisance for a short period. A passer-by or a by-stander would not find any nuisance in these organs; but the case is very different when the noise has to be continuously endured; under such circumstances it is scarcely an exaggeration to term it "maddening," going on, as it does, hour after hour, day after day, and month after month. I consider that the noise made by each defendant, taken separately, amounts to a nuisance. But I go further. It was said for the defendant Mellish that two rights cannot make a wrong—by that it was meant that if one man makes a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. If the two agreed and acted in combination each would be a wrongdoer. If a man shouts outside a house for most of the day, and another man who is his rival (for it is to be remembered that these defendants are rivals), does the same, has the inhabitant of the house no remedy? It is said that that is only so much the worse for the inhabitant. On the ground of common sense it must be the other way. Each of the men is making a noise and each is adding his quantum until the whole constitutes a nuisance. Each hears the other, and is adding to the sum which makes up the nuisance. In my opinion each is separately liable, and I think it would be contrary to common sense that the inhabitants of the house should be left without remedy at law. I think the point falls within the principle laid down by Lord Justice James in *Thorpe v. Brumfitt,* [L. R. 8 Ch. 650]. That was a case of obstructing a right of way, but such obstruction was a nuisance in the old phraseology of the law. He says: "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount

* The arguments of counsel are omitted.—*Ed.*

of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense to any one person among the hundred to say that what he does causes of itself no damage to the complainant." There is in my opinion no distinction in these respects between the case of a right of way and the case, such as this is, of a nuisance by noise. If the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the plaintiff and each must be restrained in respect of his own share in making the noise. I therefore grant an interim injunction in both the actions in the terms of the notices of motion.